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1927.

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PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[IN THE COURT OF APPEAL.]

C. A.
1926
July 9, 12.

RICHARD HUGHES AND COMPANY AND OTHERS *v.* FOWEY HARBOUR COMMISSIONERS AND COLLINS.

THE GUELDER ROSE.

Shipping—Pilotage—Fowey Harbour—Harbour Master's Powers—Directions —By-laws—Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *ss.* 52, 83.

By s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847, "the harbour master may give directions . . . . for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour . . . . and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing whilst therein." Sect. 83 empowers harbour commissioners to make by-laws for regulating the use of the harbour, the admission of vessels thereto and for their good order while in the harbour.

The clerk to the Fowey Harbour Commissioners served formal directions of the harbour master on the plaintiffs, who were the owners of a number of vessels in respect of which pilotage was not compulsory; and the masters of several of these vessels, on arrival in the harbour, were served by the harbour master with copies of these directions, which

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provided: (i.) that between sunrise and sunset the vessels should not proceed up the harbour at a pace exceeding three miles per hour; (ii.) that between sunset and sunrise they should anchor in a certain defined position; (iii.) that they should not at any time proceed above a place in the harbour known as Prime Cellars without the sanction of the harbour master; and (iv.) that they should not at any time be moved within the limits without previously notifying the harbour master; unless in any of the four cases they had a qualified pilot on board.

The plaintiffs claimed a declaration that the directions were invalid and unenforceable. Bateson J. held that the terms of s. 52 were wide enough to cover the directions, which he thought were made solely for the protection of the harbour, and were in themselves fair and reasonable. On appeal:—

Held, that although there might be circumstances under which a harbour master could give directions under s. 52 operative for more than the specific occasion, the directions in question constituted an indirect attempt to render pilotage compulsory and, taken as a whole, were in the nature of general directions which could only be made by by-law under s. 83 and subject to confirmation in the manner prescribed for by-laws; and that accordingly they were invalid and unenforceable.

Per Atkin and Sargant L.JJ., that, speaking generally, the directions contemplated by s. 52 were ad hoc directions for particular occasions.

Judgment of Bateson J. reversed.

Appeal from a decision of Bateson J., sitting with two of the Elder Brethren of the Trinity House.

The appellants (plaintiffs) were Richard Hughes & Co. and the masters of seven of their vessels; the respondents (defendants) were the Fowey Harbour Commissioners and the harbour master.

The appellants claimed a declaration that certain directions of the harbour master served by the clerk to the commissioners upon the first named appellants, and directions to the same effect subsequently served on the masters, were invalid and unenforceable on the ground that they were unreasonable, impracticable and unfair; that they were not directions of the harbour master within the meaning of s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847 (1), but were regulations

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(1) Sect. 52 provides: "The harbour master may give directions for all or any of the following purposes (that is to say), for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing, whilst therein."

Sect. 83 provides: "The undertakers may from time to time make such by-laws as they shall think fit

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made by the commissioners for the purpose of compelling the plaintiffs to employ pilots on their vessels, although not compelled by law to have pilots on board.

The directions addressed to Messrs. Hughes & Co. and sent to them by registered post were as follows :—

" Directions of the harbour master, Fowey, for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, and for mooring and unmooring, placing and removing, vessel therein.

(1.) That your steamships shall not between sunrise and sunset proceed up the harbour of Fowey at a pace exceeding three miles per hour.

(2.) That between sunset and sunrise they shall anchor in the pool east of a line from ' A ' to ' B ' and south of a line from ' C ' to ' D ' on the chart attached.

(3.) That they shall not at any time proceed above Prime Cellars without the sanction of the harbour master.

(4.) That they shall not at any time be moved within the limits without previously notifying the harbour master.

Unless in either case they have a qualified pilot on board.

Dated this 15th day of March, 1924. Walter H. Graham, Clerk to the Fowey Harbour Commissioners."

The directions subsequently served on the individual masters after each of their vessels had arrived in the harbour were in the same terms, but were signed by the harbour master.

The defence, so far as material to this report, was that the place designated for the vessels to anchor afforded a safe and sufficient anchorage ; that owing to the narrowness of the fairway, the eddies and currents, and the congestion of shipping, the entry to and exit from Fowey harbour, and particularly that part of it which lay above Prime Cellars, required great skill in navigation ; and that it was in the

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for all or any of the following purposes (that is to say), for regulating the use of the harbour, dock, or pier :

For regulating the exercise of the several powers vested in the harbour master :

For regulating the admission of vessels into or near the harbour, dock, or pier, and their removal out of and from the same, and for the good order and government of such vessels whilst within the harbour or dock, or at or near the pier : . . . ."

opinion of the defendants unsafe and dangerous to other shipping for any ship of the size and character of the plaintiffs' ships to navigate beyond Prime Cellars without either a qualified pilot on board, or, if not a qualified pilot, some person who to the knowledge of the harbour master had special local knowledge and experience, equivalent in practice to that possessed by a qualified pilot, or, in exceptional cases, by a master mariner having special local knowledge.

The defendants alleged that of the vessels of the size and character of the plaintiffs' which entered or cleared from Fowey (other than the plaintiffs' ships) more than 95 per cent. employed a pilot, and the remainder had either had on board a qualified person or had placed themselves in positions of considerable danger and risk, and had been duly warned or reprimanded by the harbour master for doing so, and had been given directions against doing so again. The plaintiffs' ships, on the other hand, which prior to 1921 employed qualified pilots, had by the directions of the plaintiff company abandoned that practice, and, as their masters were not certified master mariners and they had on board no person with special qualifications, they were unskilfully handled and had been a nuisance and danger to the other shipping in the port through neglect of seamanlike practice both in navigation, anchorage, mooring, and berthing. On December 5, 1923, and again on February 6, 1924, there were two narrow escapes from accident, and damage was done and obstruction caused owing to the negligent acts of the persons in charge of the plaintiffs' ships, and complaints by other shipowners had been lodged in consequence against the plaintiffs with the defendant commissioners.

The defendants further alleged that they had already issued, and that it was their intention to issue, similar directions to any other ships which by reason of the absence of skilled navigators on board had neglected or appeared likely to neglect the proper precautions of good seamanship; and that in issuing the directions the defendants had not sought and did not intend to differentiate unfairly against the plaintiffs, but had issued the directions bona fide in the interests of the safety of shipping at Fowey.

Bateson J. held that on the whole the directions were reasonable, although there might be a little difficulty on a dark night in locating the indicated anchorage in direction No. 2. He thought also their motive was solely to protect the harbour and not to compel the plaintiffs to take pilots. The plaintiffs' argument was that the directions were not given ad hoc, and that in the form adopted they usurped the powers of the commissioners who were empowered to make by-laws. His Lordship did not agree. He thought the words of s. 52 were wide enough to cover the directions, and the fact was that the harbour master gave directions to each ship on her arrival. The fact that the directions covered the next time that the master came into port, or the time after that, he (his Lordship) did not think mattered. The directions might cover future occasions, or it might be that the harbour master might change his directions the next time the ship came in. To say that it was a bad direction because it was not served each time the ship came into port was, in his Lordship's view, unsound. He thought therefore that the plaintiffs' claim failed.

The plaintiffs appealed.

C. R. Dunlop K.C. and *R. K. Chappell* for the appellants. Pilotage for ships of the class in question is not compulsory: see the general by-law of June 21, 1921, applying to various Trinity House out-port districts (of which Fowey Harbour was one), whereby vessels up to 1500 tons trading coastwise were exempted from the obligation to take pilots while navigating within the limits of those districts. The Trinity House and not the commissioners are the pilotage authority for Fowey, and the latter are not entitled to make it intolerable for the appellants to carry on their business except at the price of taking pilots which they cannot legally be compelled to take. The appellants have an absolute right for the harbour to be open to them: see s. 13 of the General Pier and Harbour Act, 1861, Amendment Act, 1862. The directions in themselves are unreasonable and unfair; direction No. 2 is impracticable and dangerous; and they are, as a whole, ultra vires. Sect. 52 of the Harbours, Docks, and Piers Clauses Act, 1847, contemplates ad hoc directions—particular orders to particular ships at a particular time. These directions are really general regulations which the harbour master has no power to make, nor have the commissioners, except by by-laws under s. 83, which would require confirmation by the Board of Trade; and by-laws which in effect reimposed compulsory pilotage would not be likely to receive confirmation. Further, the directions signed by the clerk and served on Messrs. Hughes were the directions not of the harbour master but of the commissioners.

W. N. Raeburn K.C., *Dumas* and *A. C. Nesbitt* for the respondents. All the findings of fact in the Court below were in the respondents' favour—namely, that the directions were reasonable in practice, were not made with any improper motive, and were the directions of the harbour master and not of the commissioners. There is undoubtedly some overlapping between the subject-matter of by-laws and directions, and the respondents do not contend that these "regulations" could not have been the subject-matter of by-laws. But by-laws are intended to be permanent and of general application, and if it is likely that any regulation may later on require to be withdrawn or modified, it is more convenient—granting the jurisdiction—to proceed under s. 52 by directions. The conditions in Fowey Harbour are not unchanging—e.g., constant dredging alters, or may alter, the anchorage ground, and directions are more elastic and more capable of adaption to changing circumstances. The statute therefore expressly and designedly creates an overlapping between ss. 52 and 83. As regards the contention that directions must be ad hoc, the term is itself an elastic one: street traffic regulations of the police may be altered daily or may be the same day after day, but in the latter case they are none the less ad hoc regulations. The appellants do not suggest that any one of these directions would be invalid if given to specific masters for particular occasions; why therefore should it be ultra vires if the harbour master says that the conditions in the harbour are such that the next time the vessel comes in she shall anchor in a certain position ? If the ad hoc argument so far prevails as to compel the conclusion that these directions are ultra vires, then, since they have been found to be fair and reasonable, they would be the proper subject of by-laws. If unreasonable, by s. 54 a penalty is provided if the harbour master acts unreasonably, and the proper course for the plaintiffs to have adopted was to have sued for the penalty ; this Court therefore should not grant the relief claimed.

BANKES L.J. This appeal from a judgment of a very experienced judge in matters relating to seamanship and navigation raises a question of some importance. The action is for a declaration that certain directions of the harbour master of Fowey are invalid and unenforceable, and for an injunction.

The action is brought by Messrs. Hughes, a firm who own a number of vessels trading to Fowey, and by the masters of some of those vessels. The defence of the harbour commissioners and the harbour master is that they are only doing what they are lawfully justified in doing. There is no doubt, reading the correspondence, that from Messrs. Hughes' point of view they think that these directions of the harbour master are unfairly directed at them. I am quite satisfied, however, that the action of the commissioners and the harbour master is perfectly bona fide, in the sense that they are only exercising what they believe to be their powers, and what they believe to be in the interests of the port of Fowey, and the vessels using that port, including, among others, Messrs. Hughes' own vessels.

It is necessary to go back a little into the past history of this harbour in reference to its position as to compulsory pilotage ; because it appears that up to a certain date pilotage was compulsory at Fowey. I have no doubt that both the commissioners and the harbour master are of opinion that the regulations which imposed compulsory pilotage upon Fowey ought not to have been withdrawn, and that the nature of the harbour is such that it requires most careful navigation and good seamanship, not only in the management of the vessel, but also in reference to moorings; and it requires also that due regard should be paid to the position of other vessels and the interests of other vessels, and that cheerful compliance should be given to the lawful orders of the duly constituted authority. They believe that all that is essentially necessary in this harbour, because of its formation and the difficulties inherent in passing the big vessels which make use of the harbour. But in spite of what the commissioners' view may be, the fact is that on June 12, 1921, a general exempting order, by-law 58 of the "General By-laws applying to all Trinity House Out-port Districts," came into force. The effect of the by-law with reference to vessels of 1500 tons or under was that they were exempted from compulsory pilotage in various out-port districts, of which Fowey was one. Two days later, on June 14, 1921, a very suggestive and significant letter was written by the harbour master to Messrs. Hughes. It calls their attention to the fact that "the moorings and laying-by berths of this harbour have all been altered during the last two months, new moorings having substituted the old ones in new positions. It is therefore necessary to warn you that all vessels not having a pilot on board must not proceed above Prime Cellars during the hours of darkness unless so ordered by the harbour authorities." That seems to me a perfectly legitimate and reasonable direction, if it were given in the form of a direction, because it indicates that within the last two months, and therefore, presumably, without the knowledge of persons who may come into that harbour, the moorings to which they have been accustomed have all been altered; and, therefore, it would not be reasonable or safe for them to go in after dark without a pilot. If matters had stopped there, if the direction had professed to be applicable to this new state of things only, I do not suppose that anybody would have had any reason to complain, because the difficulty which arises from the alteration of the moorings would cease as regards any master who came in and saw what the changes had been. At the hearing, however, the harbour master was asked whether a warning would any longer be necessary for these men who had come in and learned the conditions of the altered state of things, and whether pilotage would be necessary, and his answer was: "In my opinion pilotage is always necessary." I accept that as his genuine bona fide belief.

The next stage, according to the minute book of the harbour commissioners, was that on February 15, 1922, the harbour master reported that he had been in correspondence with Messrs. Hughes "as to their steamers moving above Prime Cellars without a pilot during the hours of darkness." That is nine months after the warning to which I have just referred. The resolution is: "That the clerk be instructed to write Messrs. R. Hughes & Co., with a copy of the commissioners' Notice to Masters, calling their attention to s. 52 of the statute 10 Vict. c. 27." The clerk's letter was as follows: "You ask to be supplied with the particular 'by-law' under which the harbour master has given instructions that vessels not having a pilot on board must not proceed above Prime Cellars during the hours of darkness, unless ordered to do so by the harbour authority. I therefore enclose a copy of the 'Notices to Masters and Owners of Vessels,' among which you will find, marked in blue pencil, the section of the Act of Parliament under which the harbour master is acting." The blue pencil mark must have been, as appears by Messrs. Hughes' letter, on s. 53 of the Harbours, Docks, and Piers Clauses Act, 1847.

Tracing the history down to this point, what had originally been an order given in reference to an emergency is now relied upon as being still required and reasonable, because the harbour master's view is that pilots always are necessary in this harbour. The next stage comes in 1923, when the commissioners considered the question whether they should not approach the pilotage authorities in order to have compulsory pilotage reintroduced. According to the minutes of May 16, 1923, "The clerk reported that the sub-commissioners of pilotage had received a letter from Trinity House, London, dated the 15th instant," in which they referred to general by-law 58, and said: "As no objections were made to those proposed for Fowey, the by-laws were confirmed in June, 1921, and the Elder Brethren in these circumstances are not prepared to consider any alterations, especially as vessels in the coasting and home trades, without passengers, have been exempted from compulsory pilotage in the out-port districts for many years past." What is the result of that? It seems to me quite plain that up to that point the commissioners and the harbour master were definitely of opinion that vessels should not be allowed to navigate or enter this port without pilots. They tried to get Messrs. Hughes to observe the direction which had been given in 1921, that the vessels should not go above this particular point without a pilot, and they had been unwilling to observe the direction, because, as they pointed out, it might have been reasonable when it was passed, but it had ceased to be reasonable to everybody who frequented the port and who could get to know where the altered position of these moorings was. Then the commissioners consider whether they can get the exemption of Fowey removed. They come to the conclusion that they cannot do that; and they must have come to the further conclusion that they could not do what they wanted to do by by-laws, because the statutory requirements as to by-laws require that they should be confirmed in a manner which, having regard to the communication they had received from Trinity House, would make it seem unlikely that they would be able to obtain the necessary authority. They are driven back, therefore, to this. If they are to do anything to improve the condition of things which they honestly think need alteration and improvement, they can only do it by directions, and by directions of the harbour master under s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847.

Accordingly, on March 15, 1924, the clerk writes to Messrs. Hughes calling attention to instances in which complaints were made of the way in which the masters of Messrs. Hughes' vessels had navigated the port and interrupted the work of the port, and endangered the safety of other vessels using the port, according to the defendants' view. There were not many instances, but there were some. "In the circumstances the commissioners have decided to exercise their powers under the Harbours, Docks, and Piers Clauses Act, 1847, and have instructed me to serve you with the enclosed formal directions made under s. 52 of that Act." That was a misapprehension in a sense, I think. At any rate it was not put forward very correctly what the authority was which was exercising powers under s. 52, because it was the authority not of the commissioners, but of the harbour master. Mr. Dunlop argued that although the voice might be the voice of the harbour master, the directing hand was that of the commissioners. I do not think that there is much force in that argument, because I think that, as the harbour master ultimately gives the direction, it does not make it any the less his direction because he was instigated by the commissioners, or it was suggested to him by them that it would be a proper order to give. Assuming the whole thing is done bona fide it seems to me to be only an inaccurate way of expressing what was really happening when this letter was written and the accompanying notice sent.

The question arises, however, whether it was unfair upon Messrs. Hughes, for the regulations which this letter and notice indicated were regulations applicable to all vessels, but only the masters of Messrs. Hughes' vessels were served with notice. It is said that it was only necessary to serve these masters, because all the other masters had complied. That may or may not be so; I do not express any opinion on it. I accept for the moment the suggestion that it was not unfair, and it was not unfairly directed to Messrs. Hughes, because it was only served upon their masters, as it would have been served upon the other masters if they had not availed themselves of the services of a pilot. However, that is the position. On every master who comes into Fowey in charge of one of Messrs. Hughes' vessels a notice is served, quite irrespective of whether the master is thoroughly competent, and one in whom the harbour master himself has complete confidence, or whether he is a master about whom the harbour master has had occasion to complain. This general form of direction is served upon them all at a time when, in the majority of cases, the bulk of the

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regulations can have no possible application, because, having already arrived in the harbour, the time has gone by when they could have any application. But they are served once and for all, and it is said, and rightly said, that the chief effect and operation of them is in reference to the future voyages of the vessels to the port, rather than to the particular occasion upon which the notice is served. I do not want it to be thought that I am holding that a harbour master may not give a direction which shall be operative not only for the particular occasion, but for future occasions, and that it may be quite reasonable and proper to give such an order. I desire to confine my judgment to the directions as a whole, given under the circumstances in which they were given, and to ask myself the question whether they are reasonable and fair. Because, if the true inference from the business point of view is, whether it was or was not intended, that the effect of these directions from a business point of view is to keep the vessels out of the port altogether, or else to take a pilot, then in my opinion they are not reasonable. It is an indirect attempt from a business point of view to impose compulsory pilotage, which it is not possible to do directly either by by-law or by any other means.

Sect. 52 of the Harbours, Docks, and Piers Clauses Act, 1847, provides that: "The harbour master may give directions for all or any of the following purposes (that is to say): for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing, whilst therein." No doubt those words are wide enough to admit regulations of the character of those which are given by the harbour master in this case. Sect. 53 provides: "The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master, made in conformity with this and the special Act; and any master of a vessel, who, after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction, shall be liable to a penalty not exceeding 20*l*." With regard to that section, the procedure to be followed seems to be this: There is a provision that every master shall obey the directions of the harbour master. If he obeys them there is nothing more to be said. If he does not obey them, then it requires notice to be served upon him containing directions; and in the case of a continued refusal to obey, if that occurs, there is a statutory right to prosecute. I do not think the statute means that it is operative only after a direction which is served upon him. Then there is a provision with regard to the reasonableness of the direction—that if a harbour master or any assistant unreasonably acts, or in any unreasonable or unfair manner exercises any of the powers or authorities vested in him, the person who offends shall be liable to a penalty. I understood Mr. Raeburn to contend that this action ought not to be maintainable, or, at any rate, this Court ought not to grant any relief because of the statutory power of prosecuting the harbour master. I do not take that view. I think that it is competent for this Court, either by way of declaratory judgment or by injunction, to enforce compliance with the statute, if it is of opinion that the directions are unreasonable or unfair.

That being so, the question is whether, giving the harbour authorities and the harbour master full credit for an honest belief that pilotage is necessary in this harbour, they have gone the right way to work and have done something which the law allows them to do. I cannot read these directions which, on the face of them, are intended to be applicable for all time and whatever the conditions existing in the harbour at the moment are, as being reasonable or really anything other than an indirect attempt to impose compulsory pilotage. It is true that we, sitting here, do not know the conditions of the harbour at Fowey as well as the harbour master or the commissioners; but we can visualise for ourselves what may happen, and applying these directions to such a state of things, can answer the question whether they are reasonable or not. I put to Mr. Raeburn the case of Messrs. Hughes' vessels arriving at night when all the mooring places which exist, or a sufficient number of them, higher up the harbour are unoccupied, and there are cargoes waiting for them, but yet they are not to proceed up the harbour but are to anchor. That is to happen on every occasion, whatever the state of the harbour is and whatever the condition of things higher up is. They are not to anchor except in what I call the notified place. Whether that place is safe depends upon the conditions and how it is occupied by yachts, and so forth. I stress that particular point more than the others because it seems to me that one can visualise conditions existing in the port in which it cannot be said from any point of view that is a reasonable or fair regulation to impose upon these veſsels for all time and under all conditions. I say nothing about speed. It is fair to remember that the masters of Messrs. Hughes' vessels in their evidence said nothing about it. I say nothing about the obligation not to move at any time without notifying the harbour master. I rest my judgment upon the directions as a whole, and it seems to me that they are more in their nature by-laws than directions. I think that directions, if they are to be applicable and enforceable in the future, must be directions which are obviously reasonable under all conditions, which these are not.

In my judgment, therefore, this Court should declare that these directions, in their present form and as a whole, are in substance not in compliance with s. 52, and are not enforceable. There will be liberty to apply. The exact form of the judgment I will indicate presently, but I think the appeal must be allowed with costs here and below.

Atkin L.J. I agree with my Lord that this appeal should be allowed. It appears to me that in fact what the Court has to decide is a dispute not between the plaintiffs and the defendants, but between the pilotage authority for Fowey and the harbour authority of Fowey on the question of compulsory pilotage. It is plain from the minutes which have been read that there was a direct conflict of opinion between those authorities on the question as to whether or not it was advisable in the interests of the port of Fowey that pilotage should be compulsory for, at all events, a much larger class of vessels than those which are now, under the order, compelled to take pilots on board. I have not the slightest doubt that the Fowey Harbour Commissioners have fully and honestly convinced themselves that it is expedient that more vessels should be under the obligation to take pilots than are at present so compelled, and that the compulsion should extend to vessels of the size of the plaintiffs' vessels in this case. I am far from saying that there are not many circumstances connected with the port of Fowey that make that a reasonable view. On the other hand, there are many questions connected with the coastal trade, the method of manning and equipping ships in that trade, and long established practice in respect of out-ports, which makes the view taken by the pilotage authorities probably also a reasonable view. At any rate, we have not got to decide that question; The final authority for determining the question of compulsory pilotage is vested in a different authority from that of the defendants. But in the meantime it appears to me that the plaintiffs are suffering, and a dispute has arisen which is of great importance to those who are engaged in what is a very considerable part of our mercantile traffic—namely, the coastwise traffic along the shores of this country.

Messrs. Hughes have a large number of vessels that come into Fowey for the purpose of engaging in the china-clay trade. Their vessels range from 600 tons to about 1200 tons, and some are a little more. They make repeated voyages to the port, managed by masters who appear in many cases to have been in the employment of the firm for a number of years, and who come regularly to the port and are very familiar with it. It is true that they are not certificated masters, but for generations it has been permitted to persons engaged in the coastwise trade to navigate vessels by masters who are not certificated. That is a matter for the Legislature. It is well known that the experienced masters who manage the coastwise vessels do in fact navigate them round the coast and in and out of harbours with remarkable freedom from any disaster. A series of difficulties, however, arose in the last four or five years between the harbour master at Fowey and some of the masters who are employed by Messrs. Hughes. There have been complaints that the masters have not obeyed the instructions of the harbour master, and complaints by the harbour master that the masters have been guilty of careless navigation or carelessness in mooring by reason of which accidents have not, indeed, taken place, but have only just been avoided. That is the kind of allegation that is made. On the other hand, the view expressed by the harbour master is controverted by the masters, and the matter has certainly not been adjudicated upon on the evidence in this particular case. The matter culminated in the complaints being passed on to Messrs. Hughes. I think some of the trouble may have arisen because of the somewhat aggressive attitude taken up by Messrs. Hughes, because I think that, possibly being tender for the seamanlike reputation of their masters, they committed themselves to phrases in letters to the commissioners which might, I think, have been modified. The net result was that the commissioners took the opportunity of warning Messrs. Hughes that unless the position was altered in reference to, apparently, all the ships, they would have to take steps; and it is obvious that the commissioners were contemplating moving in the matter. [His Lordship read various extracts from the letters of the commissioners, and continued:] On March 15, 1924, they stated: "It is quite clear to the commissioners that you do not intend to take any steps to conform to their reasonable requests regarding the handling of your vessels in Fowey Harbour. In the face of serious complaints based on reliable evidence you insist on supporting your masters against the advice of the commissioners and their harbour master." Then they complain again in relation to the *Blush Rose* and the *Ciscar*, and say: "In these circumstances, the commissioners have decided to exercise their powers under the Harbours, Docks, and Piers Clauses Act, 1847, and have instructed me to serve you with the enclosed formal directions made under s. 52 of that Act, and to give you clearly to understand that these directions will be strictly enforced in order to safeguard, so far as possible, the commissioners' own property, and the safety of other ships using this harbour. If these directions are disregarded the commissioners have power to prosecute the offenders, and they will not consider it necessary to give you notice of any further complaint, as you have had very full consideration and very full warning. I may say for your information that the feeling of the commissioners is that they would rather that your ships were withdrawn from the harbour than that other shipping should be exposed to risks such as have actually been incurred by the unseamanlike handling of your s.s. *Blush Rose* in the cases of the *Falmouth Castle* and the s.s. *Ciscar*." With this letter they enclosed the directions which are complained of. The document is addressed to "Messrs. Hughes & Co., owners of the s.s. *Blush Rose*, s.s. *Brier Rose*, and other steamships trading to and from Fowey Harbour." "Directions of the harbour master, Fowey, for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, and for mooring and unmooring, placing and removing vessel therein." That particular heading is taken from the first clause of s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847. [His Lordship then read the four directions already set out and continued :] It appears to me that these directions amount to a general order issued to the shipowners in reference to any vessel which the plaintiffs may send, regardless of the question by whom the vessel is commanded, and of the way in which the ship does, in fact, conduct herself ; any of their steamships is to be subjected to these directions, so far as one can see, for all time ; that is to say, unless and until they are specially countermanded. It is to be noticed, Messrs. Hughes having some ten or more vessels which have been proceeding to and from Fowey at different times, that the masters of eight of those vessels were thereafter individually served with special directions in this form directed to the master of the particular vessel, not by name, but addressed to him as master of the vessel. When, however, the defendants are asked for particulars of complaints, the only complaints alleged are against four of these particular vessels; against the other four there were no complaints at all. The complaints are in respect of what has happened within the last two or three years, comprising altogether in respect of those vessels, I should imagine, something like 150 or 200 voyages. By their defence the defendants say: "If (which is not admitted) Fowey Harbour is not a compulsory pilotage area for vessels of the size and character of the plaintiffs' vessels"—I think the natural caution of the pleader led him not to admit it, because it is not a compulsory pilotage area—"yet in fact, owing to the narrowness of the fairway and the eddies and currents and winds and water, and the congestion of shipping in and about the port, the entry to and exit from Fowey Harbour, and particularly that part of it which lies above Prime Cellars, requires great skill in navigation, and it is in the opinion of the defendants unsafe and dangerous to other shipping for any ship of the size and character of the plaintiffs' ships to navigate beyond Prime Cellars without either a qualified pilot on board, or if not a qualified pilot, some person who, to the knowledge of the harbour master, has special local knowledge and experience equivalent in practice to that possessed by a qualified pilot, or, in exceptional cases, by a master mariner having special local knowledge." It is to be observed that in these directions no force is given to these alternatives at all; the directions are given to the plaintiffs in respect of their ships, and they have to comply with them, unless they have a qualified pilot on board. The fact that they may have on board a person who to the knowledge of the harbour master has special knowledge or experience, or a master mariner having special local knowledge, is not given effect to at all. We were told—indeed the defendants made a great point of it—that these were directions which, though they were in fact directed to these plaintiffs by name, were only directed to them because it was a matter of general knowledge and of general application.

that any vessel of the size of the plaintiffs' ships should not navigate Fowey Harbour except with a qualified pilot; that the only reason that the notices had been served upon the plaintiffs and their masters was that no other vessels did in fact navigate the harbour without a qualified pilot; and if there were at any time such vessels, then they intended to serve similar directions upon them. It appears to me that that is a piece of general legislation by the commissioners. By that I mean general legislation within the powers entrusted to them of dealing generally with matters that concern Fowey Harbour, and it is a matter which is very appropriate to the creation of by-laws, but is not in the least within the powers which are given to the harbour master. It is plain from his evidence that this matter arose after considerable discussion between the harbour commissioners and their clerk with Messrs. Hughes. A sub-committee had been appointed to consider how to deal with the correspondence, and it is on the advice of the sub-committee that the letter in question was written by the clerk and the directions enclosed to Messrs. Hughes. I have no doubt at all that the harbour master was the person who prepared these specific instructions or directions. At the same time I have not the least doubt either that he prepared them for the purpose of carrying out the plan of the commissioners which they had expressed in their letters, both to the pilotage authority and to Messrs. Hughes, and that the real object of those directions is, in perfect good faith, to protect the interests of the navigation of Fowey Harbour, but at the same time to do it by making things so uncomfortable for anybody who does not take a pilot on board that he will be compelled either to stay outside the port or to take a pilot, the latter being the course which would naturally be expected.

It is plain that the clerk and the harbour master discussed whether to proceed by by-law or by directions; and, as one of them pointed out to the other, a breach of the directions would be accompanied by a fine of *20l.*, whereas a breach of a by-law only involved a fine of *5l.*, and how much more effective, therefore, would directions be than by-laws. Thus

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the scale swung down in favour of directions rather than by-laws. I can understand, also, that the clerk might be rather embarrassed if he had to draw a by-law which in terms said: "Notwithstanding the compulsory pilotage orders, in fact every vessel which is excluded from compulsory pilotage under those orders must still have a pilot on board"—or else be subject to embarrassing restrictions which would interfere very much with her navigation in comparison with her rivals. I say nothing as to whether any such by-law would be effective, but I come to the powers in s. 52, which provides: "The harbour master may give directions for all or any of the following purposes," such as "regulating the time at which and the manner in which any vessel shall enter . . . . the harbour," and so on. I think it is not unimportant to bear in mind the fact that under the Act by cl. 2 the harbour master means not only himself, but his assistants, because it says: All acts so required to be done by such harbour master shall include the assistants of every such harbour master. Therefore, if the harbour master has got power to give general directions of this kind, so has his assistant or assistants. The directions, also, were given first of all to the shipowners in respect of all their ships without any limit of time, and without reference to any circumstances at all, except that they were coming to Fowey Harbour. It is plain that they were given to the individual masters in pursuance of the general instructions which they had given to the shipowners. There is a power to give general directions and to make general rules of the nature of by-laws under s. 83, which says: "The undertakers"—which would include the commissioners in this case—"may from time to time make such by-laws as they shall think fit for all or any of the following purposes; (that is to say,) for regulating the use of the harbour, dock, or pier: for regulating the admission of vessels into or near the harbour, dock, or pier, and their removal out of and from the same, and for the good order and government of such vessels whilst within the harbour or dock, or at or near the pier." That seems to me to be as large a power as could possibly be given; but those by-laws can only be made in the manner prescribed; they have got to be confirmed in the prescribed way; and they are not to be confirmed until notice of application for confirmation has been given in the newspapers one month before the hearing of the application. Any person who desires to object may be heard by himself or his counsel; a copy has to be kept at the principal office; all persons may inspect such copy without fee or reward; and then the by-laws are to be published in the prescribed manner and have to be confirmed. If no confirmation is prescribed in the special Act, then they are not to come into operation until they are allowed by a judge of one of the superior Courts. That is very different from the procedure in this case—a procedure which, as regards all the matters with which it deals, might invite protest from the persons concerned, and in respect to which one would rather think that they had a right to be heard. There is a general direction restricting the general use by them of the harbour. We are told that the direction is to have general operation in respect of all vessels in like case with the plaintiff owners. That does not appear to me to be in the least a matter for which jurisdiction was given to the harbour master.

Speaking generally, it appears to me that the object of s. 52 is fairly obvious. The harbour master is the person who controls the movements of the particular vessels on the occasion when they are within the port; and, generally speaking, I have not the least doubt that his powers are given to him for the purpose of giving specific directions to specific ships for specific movements. Those are powers that must be exercised in the circumstances sometimes at once, or on an emergency in respect of which procedure by by-laws would be unreasonable and useless. The harbour master and his assistants are given equal powers. I am far from saying that there may not be occasions on which the harbour master might give a direction which is to operate for more than the event of the particular voyage. For instance, Mr. Nesbitt suggested a case where there was an obstruction in the harbour, which it was not contemplated would remain permanently. In such a case I think it is very

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probable that the harbour master might give a general direction that as long as that obstruction remained vessels were to leave it either on the starboard or on the port hand, or were to approach it in a particular way and at a particular tide. That seems to me to be something quite different from the general directions which were given in this case.

Counsel for the harbour commissioners spoke boldly—and I think quite fairly, because in my opinion it represents their case—of the harbour master and the commissioners being two legislative authorities with legislative powers that might overlap. I think that tests the matter accurately. To my mind the harbour master is not a legislative authority at all. He has no power to lay down rules of general application. His power, according to my view, is to give directions adapted to the particular circumstances of the case, as and when they arise. Therefore, it appears to me that these directions, which plainly were given by the authority of the commissioners, and were intended to operate quite generally and to have precisely the same operation as by-laws, do not fall within the class of powers that are given to the harbour master under s. 52. To my mind, therefore, they should be declared to be invalid.

I have not thought it necessary to test the question whether in themselves these directions are reasonable or unreasonable. That is a question involving a certain amount of nautical skill; and it appears to me that one would require more assistance than we have had on this matter to deal finally with that question. It rather looks as though the assessors in the Court below were a little doubtful on the question of the reasonableness of some of these directions, both as to speed and as to the place for anchorage. So far as we have been able to consult our assessors—we have not put to them any definite questions—I am not sure that they were quite agreed between themselves upon the particular matter. Therefore I express no opinion about it. I can see objections might well be made. I am quite satisfied that these regulations were made in good faith, in the sense that the harbour commissioners and the harbour master had convinced themselves that if Fowey is to be navigated with safety, all vessels of the size of the plaintiffs' should have pilots on board; but I think they have no power to proceed in the way that they did. For these reasons I think that the appeal should be allowed here and below, and a declaration made in the form which we will indicate when my brother Sargant has given judgment.

SARGANT L.J. I am of the same opinion. I will add very little to what has been said. It seems to me that the harbour commissioners and the harbour master object to the relaxation of compulsory pilotage which had been granted by the Trinity House authorities, and that together, the harbour master under the general directions of the commissioners, they set themselves to work to render the pilotage in their harbour compulsory by means of a set of so-called directions. If the directions they issued were in fact valid, I think they would have thoroughly succeeded in their object, because it seems to me that if those directions could be enforced, it would be practically necessary for the plaintiffs to employ pilots in future.

The question before us really is limited to this single point: are this set of so-called directions really directions within s. 52 of the Act, or do they in fact amount to a set of general rules such as could only be properly enacted by means of by-laws of the harbour commissioners? In my judgment it is clear that the directions under s. 52 are of a much less general character than the by-laws under s. 83, and that any directions under s. 52 would necessarily be quite subordinate to any general regulations under s. 83. The directions contemplated by s. 52 appear to me to be primarily—I do not say universally—ad hoc directions given by the harbour master or his subordinates to individual vessels, as to the particular acts that they are to do in particular circumstances. The by-laws under s. 83 clearly are rules which are to be applicable generally, and are not mere directions in particular instances. Looking at the directions here issued, under

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which of these categories do they fall? In my judgment they fall quite clearly under the category of general rules to operate for the future without qualification, and they are not particular directions such as are issuable under s. 52. I agree, therefore, that the appeal should be allowed, and the declaration should be made in terms to be proposed by my Lord.

BANKES L.J. The order will be: Appeal allowed with costs and the judgment set aside and entered for the plaintiffs with costs, for a declaration that the directions issued to the plaintiffs and their masters by the defendants are, taken as a whole, not within the powers of the harbour master under s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847, and are invalid. There will be liberty to apply.

Appeal allowed.

Solicitors for the appellants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents: *Hancock & Willis, for Stephens, Graham, Wright & Co., Fowey.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

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Shipping—Damage to Dock Works—Non-liability of Shipowner for Damage caused without Negligence—Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *s.* 74.

By s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, "the owner of every . . . . vessel shall be answerable to the undertakers for any damage done by such vessel . . . . to the harbour, dock, or pier, or the quays or works connected therewith. . . . ." While entering the plaintiffs' dock the anchor of the defendants' vessel fouled and damaged an electric light cable belonging to the plaintiffs. The damage was occasioned without negligence on the part of the defendants or their servants in charge of the vessel:—

Held, that although the exact ratio decidendi was difficult to determine, it appeared that in *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, Lord Cairns and Lord Blackburn and, per Sargant L.J. (Bankes L.J. dissenting), Lord Hatherley also, were of opinion that s. 74 only contemplated damage occasioned by negligence; that the Court was bound by that ratio decidendi for the decision of the House of Lords; and that, accordingly, the defendants were entitled to judgment.

Decision of Lord Merrivale P. [1926] P. 46 affirmed.

Appeal from a decision of Lord Merrivale P. in an action of damage. (1)

The appellants (plaintiffs) were the Great Western Railway Co., owners of the docks at Swansea; the respondents (defendants) were the owners of the steamship *Mostyn*. The plaintiffs alleged that by the negligence of the defendants' servants the *Mostyn's* anchor dragged along the bottom of the communication channel leading to the Prince of Wales' Dock and fouled and damaged an electric cable laid in a sunken chaseway on the bottom of the channel. In the alternative they alleged that the damage complained of was damage done by the *Mostyn* to a harbour, dock or pier, or works in connection therewith, and that the defendants were answerable therefor to the plaintiffs as undertakers of the said harbour, dock, pier or works by reason of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (incorporated in the appellants' various Acts relating to the docks at Swansea), as amended by s. 15 of the Pilotage Act, 1913. (1)

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(1) [1926] P. 46.

The defences raised, material to this report, were that there was no negligence, and that the defendants were not answerable to the plaintiffs under s. 74 as alleged or at all.

The learned President found on the facts that the *Mostyn's* anchor had fouled a cable belonging to the Postmaster-General lying outside the passage way, as to the presence of which no notice had been given; that by reason of such fouling the anchor was held down and was not clear of the ground, as it would otherwise have been, when the *Mostyn* entered the passage way; and that no one on board her was guilty of negligence. On the alternative contention, that under s. 74 the defendants were answerable to the plaintiffs, even without negligence, the President held that a majority of their Lordships in the House of Lords in *River Wear Commissioners* v. *Adamson* (2) had apparently put the construction upon the section that where negligence is disproved liability for damage does not lie upon an owner whose vessel while in the control of his servants has damaged a dock or works in connection therewith, and that accordingly the defendants were entitled to judgment.

The plaintiffs appealed.

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(1) Sect. 74 provides that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

Sect. 15 of the Pilotage Act, 1913, provides that: "Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."

(2) 2 App. Cas. 743.

W. Norman Raeburn K.C. and *Wilfrid Lewis* for the appellants.

Langton K.C. and *Carpmael* for the respondents.

[As the sole ground of the decision of the Court of Appeal was that a ratio decidendi, by which the Court was bound, was to be extracted from the conflicting judgments in *River Wear Commissioners* v. *Adamson* (1), the arguments, which were the same as in the Court below, are omitted. In addition to the cases there cited, *The Crystal* (2); *British American Tobacco Co.* v. *Jones* (3); and *Det Forenede Dampskibs Selskab* v. *Barry Ry. Co.* (4) were referred to.]

Bankes L.J. This appeal has been very fully argued, and in the result it leaves my mind in great doubt as to the course this Court ought to take on one branch of the argument.

The action was brought to recover damages by the dock company, the Great Western Railway Co., in respect of damage which was undoubtedly done by the anchor of the *Mostyn* on October 26, 1923, when she was endeavouring to pass into and through the communication passage from the King's Dock to the Prince of Wales' Dock at Swansea. The claim was founded partly upon the alleged negligence of those in charge of the *Mostyn* in allowing her anchor to remain on the bottom so as to get foul of the electric cables, and alternatively, whether there was negligence or not, upon the ground that the owners of the vessel were answerable in damages under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847. There is no real dispute about what happened, although it is not quite clear as to what exactly happened to the anchor immediately before it did the damage complained of. The damage was done at night, and there was a high wind blowing. The *Mostyn* got the necessary orders to pass from the one dock into the other, and she was manœuvring under the charge of a pilot to get into a proper position to pass through the communication passage. There was a small vessel proceeding in front of her, the *River Dee*,

(1) 2 App. Cas. 743.
(2) [1894] A. C. 508.
(3) (1925) 42 Times L. R. 236.
(4) (1919) 1 Ll. L. Rep. 658.

and for some reason which is not explained, that vessel got hung up for a time and interrupted the passage of the *Mostyn.* As a result of the high wind, and of being stopped in that way, it was necessary to execute some manœuvre to prevent the *Mostyn* hitting the quay, and accordingly the port anchor was dropped at a spot some 200 to 300 feet away from the entrance to this communication passage. It is not suggested that that was an improper thing to do of itself, and it was a necessary and proper manœuvre, as we are advised, in the position in which the vessel then found herself. What happened after that is described by the master in his evidence. He says when the passage was clear they proceeded ahead, and at the same time commenced to heave up the anchor, but that it could not have been off the bottom at the time they thought it would be.

The charge is that the master was negligent in reaching the chaseway in which the particular cables belonging to the dock company were when his anchor was still on the ground. That, of course, would be an act of negligence if the master had any reason to anticipate, having regard to the distance which he would have to travel, that the anchor would not have been off the ground; but if, on the other hand, he had every reason to believe, taking all the circumstances into consideration, that the anchor would not still be on the ground, the master would not be guilty of an act of negligence. What is said is that the anchor would have been off the ground but for the fact that it must have fouled the Post Office cable as the vessel was moving forward. There was nothing to suggest to any one that this had happened; it was an occurrence of which the master had no previous warning and had no reason to anticipate. Under those circumstances it cannot be brought home to him as an act of negligence that he proceeded on under the belief, which he was entitled to entertain, that his anchor was off the ground. That is the view that was taken by the President and those who advised him. They came to the conclusion that under those circumstances it was not an act of negligence on the part of the master to proceed with the anchor on the ground, although he did not know it was on the ground and had no reason to suppose it was still on the ground. In that view those who advise us agree, and, having regard to what has lately been said in the House of Lords, I definitely express my own considered opinion that the view taken by those advising us is correct. Under those circumstances I think that the appeal does not succeed upon that ground.

The other matter is one about which I feel very great difficulty, but I think, with respect to the House of Lords, it is for them to settle the difficulty which has been created by the decision to which I am about to refer, and I should not be acting with respect to the judgments of those great lawyers who gave that judgment if I were to express my own opinion in preference to what I think I must say I understand as being their view of the proper construction of s. 74.

The section itself at first sight would seem to be reasonably plain, and I cannot help thinking that this is one of the cases in which we lawyers should do better to accept the plain language of the statute, and if our view of the plain language seems to the Legislature to work an injustice, let them alter it. However, that has not been the course of proceedings here. Sect. 74 provides that: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith." With respect to Mr. Carpmael's argument I should have thought "answerable" was used intentionally as covering the widest possible area rather than being a confining expression. I need not read the rest of the language of the section, because if I were left to express my own view I should say there is nothing in the rest of the section which limits the wider language of the earlier part; indeed I think if it be critically examined it rather supports the conclusion at which I should myself have arrived. However, that was the state of things in 1847, and one may imagine that at the time this section was first introduced, as it was introduced much earlier in

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private Acts of Parliament, it was then thought that persons who invested their capital in docks and harbours and so forth should have a wider and greater protection than the common law afforded them, especially, possibly, in the case of foreign vessels. Be that as it may, what happened was that there is no decision apparently recorded until the year 1872.

In November, 1872, *Dennis* v. *Tovell* (1) was decided on a case stated by the Suffolk justices. The Court in banc which dealt with the matter was a strong Court composed of Cockburn C.J., Blackburn and Quain JJ., and they accepted what seems to me to be the plain meaning of the section. They in terms held that the owner of a vessel was answerable, and answerable in damages, without any fault or neglect on the part of anybody. The Legislature made no move after that decision, and somewhat curiously, within a month, in December, 1872, the *Natalian*, the vessel which was the subject-matter of *River Wear Commissioners* v. *Adamson* (2), did the damage to the Sunderland Docks, which was the subject of all the subsequent litigation. That case was tried by Quain J. at Durham assizes in 1873, and he being a party to the previous decision to which I have referred, gave judgment for the plaintiffs with leave to move to enter a non-suit, or a verdict for the defendants. The damage was considerable, 2825*l.*, and the matter in the Michaelmas term, 1873, came before the Court of Queen's Bench, and they, on the authority of *Dennis* v. *Tovell* (1), upheld the decision, Blackburn J. expressing the hope that the Court of Appeal might see their way to a contrary decision. The case did not come before the Court of Appeal until May, 1876, but during all that time the Legislature made no move, although there were these two decisions, the effect of which was to make the owner answerable whether or not an actionable wrong had been committed. Then the matter came before the Court of Appeal, consisting of Kelly C.B., Mellish L.J. and Sir George Jessel M.R., and they proceeded to put some limitation upon the section. The limitation, as I read that decision, was that the section could have no operation where the damage was caused by an act of God as opposed to some act the result of man's agency. In that case, the vessel being a derelict and having been abandoned by her crew, by the force of the wind and waves was driven on to this pier. The Court of Appeal held they were justified in putting a limitation upon the language of the statute, which excluded a case such as that.

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(1) (1872) L. R. 8 Q. B. 10.

(2) 1 Q. B. D. 546; 2 App. Cas. 743.

The matter then came to the House of Lords, and according to the headnote the reporter considered that the decision was: "That, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable." (1) Of course, if that was all there was in the decision it is easy to distinguish this case from that, because this is a case in which the vessel was proceeding from dock to dock under charge not only of the master, but of a pilot, and, therefore, a case clearly distinguishable from the derelict vessel with which the House of Lords was dealing. That is what the reporter sets out in his headnote as the decision. The headnote states that Lord Gordon dissented on the ground that he took a different view of the statute, and the reporter sets out his view of Lord Cairns' opinion, but he, perhaps wisely, says nothing about the view of the other Lords who gave other opinions. When one looks into this case, as many people have looked into it, every one finishes the consideration by being more or less puzzled as to what really was the view of the learned Lords; but one must, if one can, extract from the opinion any ratio decidendi upon which the decision of at any rate the majority, or a substantial number of the learned Lords, is founded. There is no sort of doubt about Lord Cairns' view. His view was that the section merely related to procedure in the sense that it only applied where an actionable wrong could be proved. I do not think that it can be said that a similar view was taken either by

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Lord Hatherley or by Lord O'Hagan, and it certainly was not by Lord Gordon. When one comes to Lord Blackburn it is not easy to see what his opinion exactly was, but he does state definitely that in his opinion, and in his view of the judgment of Mellish L.J., there must be a case of actionable wrong in order for the statute to apply.

Under those circumstances it seems to me that it would not be respectful for this Court to say that it is open to them to put their own construction upon this statute, and all I say about it is, that I feel constrained to accept this opinion of the House of Lords as a decision that the statute does not help the appellants in the present case, having regard to the fact that we are unable to find that there was any negligence on the part of those in charge of the vessel. I think, therefore, that this appeal must be dismissed with costs, but I hope that the matter will be taken to the House of Lords, and an end put to the doubt which certainly exists as to the true construction which ought to be put upon this statute.

ATKIN L.J. I agree. On the question of fact as to negligence I propose to say very little in addition to what was said by the President, and what has been said by my Lord. It appears to me that on the whole there was evidence to support the view that the fouling of the Post Office cable by the defendants' anchor was sufficient to delay the eventual raising of the anchor, and thereby cause it to foul the plaintiffs' electric power cables, the subject-matter of this action. I think it follows that though the defendants in normal circumstances would be guilty of negligence in dragging their anchor along the passage way, yet on the facts of this case they started to heave on the anchor in time to avoid that happening, and it was only as a result of a contretemps, which they could not have contemplated, that in fact they dragged the anchor as long as they did, and so caused this particular damage. I think, therefore, the defendants are acquitted of negligence.

This finding gives rise to what is the really important question as to the construction of s. 74. Upon that, I am

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bound to say I have felt very considerable doubt arising out of the well known difficulty in exactly ascertaining what the ratio decidendi of the House of Lords was in the *Wear Commissioners*' case. (1) I say well known difficulty, because the case has, in fact, been discussed in the House of Lords itself in *The Crystal* (2), and when I have the authority of Lord Herschell for saying it was impossible from the decision in the *Wear Commissioners*' case (1) to extract any principle which is a guide to the construction of any section other than the section in question, I think one is justified in feeling difficulty oneself in ascertaining what is the true principle. I think that one is entitled to explain shortly how the difficulty arises.

It is plain that in *Dennis* v. *Tovell* (3) the Court of Queen's Bench had decided in terms that the owner of a vessel was absolutely liable for any damage done by the vessel, whether caused by negligence or by inevitable accident, and that case has been followed by Sir Robert Phillimore in *The Merle* (4), not expressing any opinion of his own, but following the decision of the Court of Queen's Bench. Then there came the question which arose in *River Wear Commissioners* v. *Adamson*. (1) In that case the Court of Queen's Bench had followed their decision in *Dennis* v. *Tovell* (3), and had held that where there was no suggestion of negligence on the part of the master or crew of the vessel, still the owner of the vessel was liable for damage done to the plaintiffs' pier. In that case, owing to the violence of a storm, the vessel had struck the shore and the lives of all on board were put in peril. The crew had been saved by the rocket apparatus, and the ship had remained where she struck about a hundred yards from the pier. When she struck and the crew left the tide was low; some hours afterwards, when the tide rose, the ship was driven by the storm against the pier, and beaten against it so as to cause part of the damage. The rest of the damage was caused in a similar way at several subsequent tides. The storm continued to rage during the whole of the time

(1) 2 App. Cas. 743.
(2) [1894] A. C. 508.
(3) L. R. 8 Q. B. 10.
(4) (1874) 2 Asp. M. L. C. 402.

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between the quitting of the ship by her crew and the doing of the damage. At no time after the quitting of the ship was it possible for the crew or any other persons to go on board the ship or in any way obtain control of her. I have no doubt at all that in that case there was no suggestion of negligence on the part of the master or crew, and the Court of Appeal reversed the decision of the Court of Queen's Bench. (1) It appears to me it is plain that in doing that they accepted the view that the owner of a vessel might be answerable for damage done by the vessel even though that damage was not actionable damage, because what they considered was the suggestion that in that case the damage was caused by an act of God. Clearly, damage can be caused to a pier which is neither actionable, nor, on the other hand, caused by an act of God; the damage may be caused by an accident without negligence on the part of anybody, and yet in circumstances which could not possibly be suggested to be an act of God. But the Court of Appeal never apparently thought of putting it upon the footing that the damage referred to in the section was actionable damage, and in terms said that there must be an implied exception in the case of damage caused by an act of God. That is the view expressed by Sir George Jessel M.R. and by Kelly C.B., who says: "On the general language of this Act of Parliament, though at first sight it seems to provide that the owner of the vessel shall be liable whenever it comes in contact with the pier, yet that we must qualify that provision by introducing into it the maxim of the law, that no man is to be answerable for the consequences of the act of God." Then Mellish L.J. gives his judgment. (2) It does not appear to me that he was intending to differ from the other members of the Court; on the contrary, he says: "I am of the same opinion," and then he goes on to say: "It clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law," and then he says: "Looking at the pointed language in which negligence

(1) 1 Q. B. D. 546, 551.

(2) 1 Q. B. D. 546, 553, 554.

or wilful act is brought in, looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to shew clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it." I think he means by that a case where there was an inevitable accident, and the result was not due to the negligence of the master and crew. I do not think he is looking to the case where there might be damage caused by shipwright's people moving the vessel when the master and crew were not on board, or were not in charge. He continues: "But the question arises, because we may decide, on the language used, that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever, where the vessel physically damages the pier, etc., the owner is so liable? I am of opinion that the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier."

I think it is significant that the Lord Justice there does not say "through the wrongful act" of man, which would be quite easy to say if he thought the matter was a question of actionable damage, but he says "Through the act" of man, and then he goes on to say: "But although that is the case with regard to the act of man, the act of God is in view of the law opposed to that which may be said to be act of man, and the act of God does not impose any liability on anybody." Having drawn that contrast between the act of man and the act of God, he goes on to say this: "It looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable." I understand the Lord Justice to mean that if the damage is done in some way by the act of man, it does not matter

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whether it is done with negligence or without negligence; in order to avoid the trouble of proving it was owing to some particular person's negligence and that person is the servant of the owner, the owner shall be liable: "but if it was the consequence of the negligence of somebody else that person is not discharged, and you may have your remedy over." Again the conditional "if" seems to make it quite plain that the learned Lord Justice is contemplating the liability of the owner even if it was not the consequence of the negligence of somebody else, and if it was the negligence of somebody else the owner is to have the remedy over. Then he says: "Therefore I agree that the judgment should be reversed." Denman J. and Pollock B. give judgment, I think one may say, for similar reasons. (1)

The case then went to the House of Lords (2), where it is significant that Sir John Holker, who was arguing for the respondents, never suggested that the true construction of the Act of Parliament was that the owner was only to be liable if in fact there was damage which was actionable as against somebody, though not the owner. All that he said was: "The terms of the section shewed that the liability was only to be incurred when some degree of control existed." The case was decided by five members of the House of Lords, and I think Lord Cairns undoubtedly in terms holds that the section only makes the master liable in cases where it proceeds "upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God." I think it is rather significant that he should so contrast the two, because, as I have said, there is certainly an intervening set of circumstances—but to that one need not attach too much importance. Then he goes on to deal with the possibility of a claim against the master or crew, I think somewhat extending the precise words of the Act so far as the liability over against the crew is concerned, and he continues: "The clause appears to me to be a clause of

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(1) 1 Q. B. D. 546, 555, 556.

(2) 2 App. Cas. 743, 747, 751.

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procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against any one existed before." It is a little difficult to follow this, because it seems to me plain that if the statute creates a liability in some one who was not liable before, it is not a mere matter of procedure, but that it in fact creates a right of action against him.

Lord Hatherley's judgment (1) I pass over, because I really do not know, after reading it very carefully, what the view was that he formed about the matter. I see many passages in which he seems to me to dissent from the view which had been expressed by the Lord Chancellor, and I think dissented clearly from the decision of the Court of Appeal that the act of God imposed an exception to the operation of the statutory liability. But then he says that "the expression of the late Lord Justice Mellish may come nearer to the mind of the Legislature," and adds: "However, it is the opinion, I believe, of the majority of your Lordships that, on the whole case being considered, this is not a case that we can regard as struck at by this clause. Whether the ground to be assigned for that is the view which has been expressed by the noble and learned Lord who preceded me, and of whose opinion I speak with the highest respect, or whether any view may be adopted by any of your Lordships similar to that taken in the Court below, leading to the conclusion that the damage which here occurred is not brought within the meaning or purview of this Act, I shall not pause to inquire. There being this doubtfulness of opinion, I shall not do what I might probably under other circumstances have thought it my duty to do in this case. I am unwilling to do anything farther than to say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack otherwise than with extreme doubt and hesitation." (2) Whether he really was concurring in the appeal being allowed, or the appeal being dismissed,

(1) 2 App. Cas. 743. 747, 751.

(2) 2 App. Cas. 743, 754, 755, 762.

or whether he was concurring in the opinion given by Lord Cairns, I do not know; but if it was the latter he clearly was stating his view with extreme doubt and hesitation. So far as Lord O'Hagan is concerned, I think it is quite plain that he did not accept the view that damage meant actionable damage, because he says that he holds with Mellish L.J. that the section points to something done by the act of man, or to the act of the person in charge, and he eventually says that in the view that he has presented, "the only case cited as touching the present (*Dennis* v. *Tovell* (1)), has no application to it. There, the vessel was not derelict, and the owner may have properly been held liable." The result is that it is quite impossible for Lord O'Hagan to have said that that case might still apply and the owner might properly have been held liable, if he concurred in Lord Cairns' view that "damage" only meant actionable damage, because in *Dennis* v. *Tovell* (1) the damage was not actionable and had been so held.

I now come to the judgment which I think causes the greatest difficulty: that is Lord Blackburn's judgment. (2) After dealing with the rules of construction and stating that the common law requires the liability of the owner to be founded upon the negligence either of himself or of his servants, he says this: "Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved"—"these," I think, means that it was the fault of those managing the ship, and those in fault were the servants of the owners—"and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed: and with a view to meet this, the

(1) L. R. 8 Q. B. 10.

(2) 2 App. Cas. 743, 768, 769.

remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour." Then he says: "The cases of a common misfortune befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words. My Lords, on reading the words of the enactments, I am brought to the conclusion that such was the scheme of legislation adopted by Parliament; the mischief being the expense of litigation; the remedy that the owners should be liable without proof of how the accident occurred." If one were to pause there, one would have thought the matter was quite plain, and that the owner was to be liable whether the accident was caused by the negligence of anybody or whether it was not. It might be said: What relief is given to the dockowner in fact if he still has, when challenged, to prove that the accident happened by the negligence of somebody? He is in exactly the same position, so far as expense is concerned, as though that somebody were the shipowner's servant, and he is saved no expense at all. Nor do I see how it could be any relief to the dockowner to say: "Well, you have not got to prove it was the negligence of any particular person, yet you must prove that the damage was caused by negligence." Try and adapt that statement to concrete facts, and it will be found to be quite impossible; it never could be proved that the accident was caused by negligence without in fact investigating the whole of the facts, and without in every case saying that it was caused by the negligence either of the master in giving a wrong order, or of the engineer in not carrying out the order, or of the steersman in taking the wrong course, or in many of the different ways in which accidents do happen.

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Lord Blackburn then goes on to deal with *Dennis* v. *Tovell* (1), from which he now dissents, and no doubt he would be right in dissenting if the view was correct that the owner was only liable where the damage was caused by the act of man. He continues: "In the present case, if the object of the statute be, as Mr. Baron Pollock says, and as I think it is, with a view to avoid expense and delay, that the owners of the dock are not to be put to the proof of negligence, or to the proof of how the injury was occasioned, that object would be to some extent less effectually carried out by importing such an exception"—that is an exception of the act of God. Then he says: "Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the Court in putting any meaning on the words which they will bear in order to avoid it. Both the late Lord Justice Mellish, and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man; damages for which someone is answerable at common law." (2) That was a view no doubt expressed by Lord Cairns, but, with great respect, it seems to me entirely opposed to everything that was said, or intended to be said, by Mellish L.J., who I think was dealing with an accident which happened where the ship was under control and not with a case where the ship was derelict. Then eventually Lord Blackburn says—and this is the passage which I think we have to give effect to: "My Lords, after much hesitation and doubt, I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words 'damage done by the ship,' as used in this enactment, necessarily include all expenses occasioned by misfortunes in which the ship was involved in common with the piers. Lord Justice Mellish, for whose judgment I have always had a degree of veneration which his lamented death permits me to express more freely than I should think seemly if he still lived, seems to have thought that these words might bear the more restricted sense of injuria cum damno." (1) I think the words of Mellish L.J. are completely misunderstood, and this passage I would attribute to a feeling of reverent misunderstanding. "The declared object of the enactment is the protection of the piers, &c., from 'injury,' which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from 'loss.' If they can bear that sense, we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs." (2)

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(1) L. R. 8 Q. B. 10.

(2) 2 App. Cas. 743, 771, 772.

It puts one in a little difficulty when one reads the judgment, stated to be affirming a judgment which is said to be based upon a principle, and which so far as I can see is based upon an entirely different principle; but there we have a judgment of the House of Lords dismissing an appeal in which the Lord Chancellor and Lord Blackburn, after, with great respect, saying the exact contrary, eventually say that they base the judgment upon the principle that damage to the ship means injuria cum damno; we have Lord Hatherley expressing in his judgment views which do not appear to convey any very decided result; and we have Lord O'Hagan no doubt assenting for a different reason. Lord Gordon differs, and if one were to express one's own opinion, one might perhaps say that Lord Gordon's opinion seems to give a very plain and natural meaning to the words of the section. Upon the whole, it appears to me that, trying to find a ratio decidendi for the decision of the House of Lords, it is to be found in the reason given by the only two members of the House of Lords whose views actually concur upon anything, and under those circumstances I think it would be wrong for us not to accept that as binding upon us.

For these reasons I agree that the appeal should be dismissed, but I am bound to say that the question being so very important on the position of harbour authorities, I think it is unfortunate that it should be the subject of so much doubt,

(1) 2 App. Cas. 743, 771, 772.

(2) 2 App. Cas. 743, 772.

as it undoubtedly must be, so long as it is based upon the decisions in the *River Wear Commissioners* v. *Adamson.* (1) To my mind there is no question at all that it was intended that harbour and dock authorities were to be given some sort of relief in respect of vessels which enter their docks and may pass out of them and never be seen again, foreign as well as British vessels. For these reasons, in view of the fact that it was plainly intended to give the owners of harbours and docks some protection, and in view of the fact that the protection given them by the House of Lords seems to me to be quite elusive, I think it would be much more satisfactory that the House of Lords, who can survey this decision, should have the opportunity of saying what it really means.

SARGANT L.J. I agree that the appeal should be dismissed with costs. As regards the question of fact I need say very little. No doubt at first sight it appears to suggest negligence that the anchor should be dragged for any distance through this opening and so be liable to foul anything that might be there, but having regard to the position in which the vessel was placed and the manœuvre that she was executing, and having regard to the advice which we have received from the assessors—though I wish to say I have formed my own opinion on the matter while giving weight to theirs—I do not see my way to differ from the conclusion which was arrived at by the learned judge below and which my brethren have already expressed. It seems to me that the negligence was not merely not proved, but was disproved on the whole balance of the evidence.

Then comes the very difficult question whether there is a greater liability imposed by virtue of the Act of 1847, and here the matter mainly has to be decided on the question of authority. Is there a decision of the House of Lords in which the majority of the House have come to a conclusion which renders the matter unarguable before us ? For myself, apart from the question of authority, I must say that I have been entirely convinced, contrary to my first impression, by

(1) 2 App. Cas. 743.

the arguments and the speech of Lord Cairns in the House of Lords, and in coming, as I do, to the conclusion that we are in fact bound by authority, I would add that I feel happy in that decision, and that if I had to express my own view it would be a view entirely in accordance with the reasoning of Lord Cairns.

This fact at any rate has to be faced in construing this section—I leave out the early case decided by the Chief Justice, Blackburn and Quain JJ. (1)—that with the exception perhaps of Lord Gordon, every judge has found it necessary to impose some limitation on the liability imposed by s. 74. In the Court of Appeal the exception introduced was an exception of cases in which the damage was caused by the act of God, in the technical legal sense. In one or more of the speeches in the House of Lords the exception was introduced that it must be damage at any rate due to some human agency; that if the damage was caused by some hulk which had been derelict for a long time and not under any human control at all, a case of that kind must be excluded from the change in the law effected by the exception. If that is so, and some limitation has to be introduced, it appears to me that the limitation introduced by Lord Cairns is the more reasonable limitation having regard to the language of the section.

The section reads in this way: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same." It seems to me that the second sentence there, "and the master or person having the charge of such vessel or float," is primarily, in the ordinary reading of the clause, applicable to as wide a range of subject-matter as the first sentence in the clause, and that it therefore assumes that

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(1) L. R. 8 Q. B. 10.

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the cases dealt with by the earlier words of the clause are cases in which there has been some person through whose wilful act or negligence the damage has arisen. No doubt the clause was inserted for the purpose of putting the owners of docks in a stronger position than they were in before, but it seems to me that it is a sufficient explanation of the clause, it strengthens their position by providing that when damage had been done to their works it should not be necessary for them to trace back through a chain of agency the responsibility for that negligent act to the owner of the vessel; that in cases where the whole body of persons who might be comprised within the term "the ship," or the entity the ship had done damage in fact by negligence to the works, that there the liability should be cast upon the owner, and that it should not be necessary, as it would otherwise have been, to show that there was a chain of agency reaching from the owner of the vessel down to the person by whose negligence the damage was caused. It seems to me that that would be a very substantial relief to the owners of such works, because I think there may be many cases in which it is clear that damage is caused by some act or neglect on the part of somebody on board, and yet it may well be difficult to say who precisely that person was and also difficult to show that he was a person for whose negligence, either directly or by some intermediate chain of agency, the owner of the ship was responsible.

Having expressed my view to that extent, and conscious that the expression of my individual view is of little consequence in view of the much higher authority which has already been devoted to the elucidation of this section, I want, before coming to the judgments in the House of Lords, to say a word about the meaning of the judgment of Mellish L.J., because that affects to a considerable extent the meaning of the judgment of Lord Blackburn, and unless that judgment is in accordance with the view of Lord Cairns, it is obvious that there is no clear majority of the House of Lords in favour of the doctrine that this section relates to a case where there is both damnum and injuria. In the judgment of Mellish L.J. there is this passage: "Looking at the pointed language in which negligence or wilful act is brought in"—I think that is by what I have called the second sentence of the section—"looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to show clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it." (1) I think there the learned Lord Justice is speaking of the master and the crew as being the persons who were prima facie the agents of the owner, and therefore he is saying that the owner is intended to be rendered liable when the negligence is not attributable to the persons for whose negligence he is prima facie responsible. He deals with the matter again, and I think the same meaning is to be attributed to his remarks. "It looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable." (1) There again, it seems to me that what he is contemplating is this: There may be a case where there is negligence, and yet it may be extremely difficult to say who is the particular person who is guilty of the negligence, and further whether that particular person is in such relation to the owner by virtue of a chain of agency that the owner ought to be held liable for the negligence of that person. I think the Lord Justice means that the owner of the works is relieved from the necessity, not of having to show that there was negligence, but of having to prove a chain of agency and the negligence of a particular person so as to bring the negligence home to the owner of the vessel.

Turning to the judgment of the House of Lords (2) in that case, I need say nothing more with regard to the judgment of Lord Cairns. With regard to the judgment of Lord Hatherley, I have had, as my brethren have had, great difficulty in appreciating precisely what the final conclusion of the learned Lord was; but I have, on the whole, come to the same conclusion as the learned President in this case, that is to say, I think the final passage in Lord Hatherley's judgment means that he does concur in the reasoning or in the result of Lord Cairns, although he does it with the greatest possible personal reluctance. It seems to me that he is there expressing this view, that he gives way to the personal ability or respect which he feels towards Lord Cairns, and that he does not differ from his conclusion. He says: "I am unwilling to do anything farther than to say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack otherwise than with extreme doubt and hesitation." (1) I think that means that he does concur with him in the end, but in ultimately concurring he has gone through a process of extreme doubt and hesitation. If that is so, it means that two at any rate of the Court are in favour of the view that damnum cum injuria is necessary in order that the owner may be made liable. Then when we come to the judgment of Lord Blackburn, it seems to me that, if I am right in the view which I form as to the meaning of the judgment of Mellish L.J., it is easier to come to the conclusion which my Lord has come to, and which I think Atkin L.J. has come to, that on the whole Lord Blackburn means to concur with the view that damnum cum injuria is a necessary ingredient. No doubt Atkin L.J. thinks that that conclusion, although it was arrived at, was due to a misapprehension of the meaning of the judgment of Mellish L.J. On that latter point I cannot quite agree with him. I agree with him in thinking that Lord Blackburn meant to come to the conclusion that damnum cum injuria was necessary, but I think that he arrived at that conclusion, not under misapprehension of the meaning of Mellish L.J., but on a true appreciation of the meaning of his judgment.

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(1) 1 Q. B. D. 546, 553, 554.

(2) 2 App. Cas. 743.

Finally, the whole question of the meaning of the speeches of the noble Lords in the case in question has been very carefully reviewed by the learned President in his judgment,

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(1) 2 App. Cas. 743, 756.

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and having read and reread what he has said on that subject, I entirely concur with him in that review and the reasons given for his view as to the ultimate effect of those judgments. I may perhaps add that the case which was recently decided by Roche J. as to contributory negligence and as to the owners or undertakers of a dock not being able to succeed where there was contributory negligence on their part, *Det Forenede Dampskibs Selskab* v. *Barry Ry. Co.* (1) was in my opinion correctly decided. That case recognizes that in another respect a limitation may have to be imposed upon the absolute liability apparently provided by the statute.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants: *A. G. Hubbard.*

Solicitors for the respondents: *Ingledew, Sons & Brown, for Ingledew, Sons & Crawford, Swansea.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

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THE RUAPEHU.

Shipping—Ship Repairers—Dockowners—Damage to Ship by Fire in Dock—Ship under Repair—Limitation of Liability—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 *Vict. c.* 32), *s.* 2.

By s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, the owners of any dock (which by sub-s. 4 includes dry docks) "shall not, where without their actual fault or privity any loss or damage is caused to any vessel, ... be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock . . . . owner . . . . performs any duty or exercises any power."

The plaintiffs, owners of a dry dock at Blackwall, sought to limit their liability under this section in respect of damage caused by a fire which broke out on the defendant's vessel owing to the negligence of the plaintiffs' servants while the vessel was being repaired by them in the dry dock. Hill J. held that the section did not apply to protect dockowners in respect of damage caused to a vessel by the negligence of their servants while acting in the capacity of ship repairers. On appeal:—

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(1) 1 Ll. L. Rep. 658.

Held, that while some limitation must be put upon the general language of the section, which if applied in its strict literal sense would lead to an absurdity, the limitation to be put was not in respect of the nature of the act done but in respect of area—i.e., the damage must be in some way connected with the ownership of the dock.

The City of Edinburgh [1921] P. 274 considered and explained.

Decision of Hill J. reversed.

APPEAL from a decision of Hill J. in an action of limitation of liability.

The plaintiffs (appellants), R. and H. Green and Silley Weir, Ld., sought to limit their liability under the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, for damage done by fire to the defendants' steamship *Ruapehu* while she was undergoing repairs by the plaintiffs in their dry dock at Blackwall in May, 1923. The fire was caused by the negligence of the plaintiffs' servants in and about the repair while at work in the stokehold and No. 3 hold, and in an action tried in 1924 the plaintiffs were held liable for the damage. They now claimed to limit their liability under s. 2 of the Act of 1900. (1)

Hill J., in a considered judgment delivered on March 29, 1926, after stating the above facts, continued as follows:—

"It was conceded at the hearing that the damage was caused without the actual fault or privity of the plaintiffs. The plaintiffs, being owners of a dry dock, are 'owners of a dock' within the meaning of the section. The *Ruapehu* was at the time of the damage within the area of the plaintiffs' dry dock. The negligence for which they have been held liable had nothing to do with docking or the undocking of the ship, or the arrangement of the shores or blocks, or the pumping out or letting in the water, or other matters necessary to the proper management of a dry dock, or of a ship in relation to a dry dock. It is true that the repairs, which included the removal of some floor plates, would hardly have been done afloat, but the work in the course of which the plaintiffs' servants were negligent was work of repair to the ship.

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(1) Sect. 2 sub-s. 1: "The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is or within the period of five years previous thereto has been, within the area over which such dock . . . . owner . . . . performs any duty or exercises any power.

Sub-sect. 4: "For the purpose of this section the term 'dock' shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks. . . . ."

"There is no direct decision applicable to the present case. The decision in *The City of Edinburgh* (1) was that a ship repairer could not limit liability on the sole ground that he owned a dry dock at a place remote from the spot where the ship lay during the repairs. But the judgments of the Court of Appeal give me guidance as to the principle to be applied in construing a loosely drawn section. The section presupposes a liability and limits it. The Court of Appeal says that the liability is a liability of a dockowner as dockowner, a liability incurred in the capacity of dockowner, and does not include a liability for anything a dockowner chooses to do in any other capacity. Applying that principle to the facts of this case, it is apparent that the work in which the negligence arose was work of the plaintiffs done in the capacity of ship repairers, and not in the capacity of dry dockowners. Suppose shipowners hired a dry dock belonging to a public authority, as, for example, the Mersey Docks and Harbour Board, and employed a firm of ship repairers to do repairs to the ship while she lay in that dry dock, and the repairers incurred liability by negligence while at work in the holds of the ship, it would be clear that the repairers did not incur the liability in the capacity of dockowners. And when the liability is incurred in exactly the same way, the fact that the ship is in a dry dock belonging to the repairers does not turn the work into work done in the

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(1) [1921] P. 274.

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capacity of dockowners. The mere fact that the ship is in the repairers' dry dock cannot have that effect. Suppose the negligence set on fire the sheds belonging to the plaintiffs' yard and the fire spread to the ship, no one could say that that was negligence of the plaintiffs in the capacity of dry dockowners or that the liability was incurred in that capacity. Suppose the owner of a wharf, within the meaning of the section, also owned a factory or a warehouse adjoining the wharf, and by his negligence the factory or warehouse was set on fire, and the fire spread to a ship lying at the wharf, no one could say that the negligence arose, or the liability was incurred, in the capacity of wharfowner. Suppose a railway company owns a pier, within the meaning of the section, and also steamships. The railway company, for reward, permits another ship to lie at the pier within the area over which it has control or management. One of the railway company's steamships by negligence of the master or crew collides with that ship. The negligence arises, and the liability is incurred, in the capacity, not of pierowner, but of shipowner, and the limitation is not that provided by s. 2, but by the Merchant Shipping Act, 1894. In these illustrations I am assuming a wharfowner or pierowner who comes within s. 2.

"I have given these illustrations, and thought of others, because they assist me to decide whether the liability of the plaintiffs in the present case arose from negligence in work done by them in their capacity of dockowners. I hold that it did not. Sect. 2 does not apply. There must be judgment for the defendants, with costs."

The plaintiffs appealed.

Langton K.C. and *Carpmael* for the appellants. The learned judge construed the decision of the Court of Appeal in *The City of Edinburgh* (1) too widely, and has taken one sentence from the judgment of Scrutton L.J. as constituting the decision of the Court. It did not, and further it would seem that the Lord Justice himself was not imposing the

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limitation on the words of the section attributed to him by Hill J., but that, read as a whole, his judgment merely indicates his view that the dockowner is not protected in respect of damage in no way connected with the ownership of his dock done to a vessel by his servants, i.e., that the limitation is in respect of area and is not based on the exact nature of the act done. This interpretation is in accordance with the judgment of Lord Sterndale M.R. *The City of Edinburgh* (1) merely put a construction on the section which avoided an obvious absurdity. It is impossible to differentiate between acts done as dockowner and acts done as ship repairer. There may be dry dockowners who do not do their own repairs, but dry docks are almost exclusively used for ship repairing and their owners do not cease to be dry dockowners or cease from acting in that capacity, because they do their own repairs. They are bailees of the ship, and are paid dues whether they do the repairs or not. The fact that dry dockowners are included in the list of persons entitled to limit their liability tends to show that the Legislature meant to encourage persons to build and own dry docks in order to increase facilities for ships to be repaired. There is nothing in the words of the section to suggest the limitation put upon it by Hill J., and unless the language of the section, taken in its ordinary meaning, would lead to a manifest absurdity—which in this case cannot be contended—it should be read in that sense: see, as to construing an Act of Parliament, *Vacher & Sons* v. *London Society of Compositors* (2) and *Hollinshead* v. *Hazleton.* (3)

[*The Warkworth* (4) was also referred to.]

G. St. C. Pilcher (*W. A. Jowitt K.C.* with him) for the respondents. *The City of Edinburgh* (5) shows that there must be some limitation on the wide words of the section, and, when that case was before Hill J., counsel for the defendants argued that the limitation was twofold—namely, that the section did not afford relief to the dockowner unless the liability was incurred within the area of the dock and also in the capacity of dockowner. They were stopped in their argument and no decision was given on the second point by the learned judge; but in the Court of Appeal Scrutton L.J., when he said that to read the words "as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity," must have been of opinion that both limitations must be read into the section. Just as a shipowner can only limit his liability in respect of damage done by his ship, so the dockowner can only limit in respect of damage done qua dockowner; and such a limitation would still protect the dry dockowner against all the risks of docking, undocking, shoring, pumping, etc. The words "performs any duty" and "exercises any power," show that the section really has reference to public authorities, such as the Mersey Docks and Harbour Board or the Port of London Authority. All such authorities own dry docks, but they are not ship repairers and they let their docks to the shipowner for repairs to be done by a firm of ship repairers. Hill J., therefore, was right in construing the section as having no reference to damage occasioned by ship repairers who happen to own the dock in which the repairs were executed. If the territorial limitation only is to be inferred the anomalous situation would arise that a ship repairer owning one dock and hiring another would be able to limit his liability in respect of damage occurring in his own dock, but not in respect of damage in the hired dock. As Lord Blackburn said in *River Wear Commissioners* v. *Adamson* (1) it is impossible to know what the intention in an Act of Parliament is without seeing what the object was; and when this statute was drafted the Legislature had not got ship repairers in view, but dockowners.

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(1) [1921] P. 274.
(2) [1913] A. C. 107.
(3) [1916] 1 A. C. 428, 438.
(4) (1884) 9 P. D. 145.
(5) [1921] P. 274, 278.

[Reference was also made to *Cox* v. *Hakes* (2) and *Secretary of State for Home Affairs* v. *O'Brien*. (3)]

No reply was called for.

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(1) (1877) 2 App. Cas. 743, 763.

(2) (1890) 15 App. Cas. 506, 518.

(3) [1923] A. C. 603, 610.

BANKES L.J. An action was brought by the owners of this vessel against the owners of the dry dock in which she was to recover damages in respect of a serious fire which took place on board her while she was in the dry dock. That action ultimately was decided in favour of the shipowners; and in the present action the owners of the dry dock are seeking to obtain the benefit of s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. The only question is as to the proper construction to be put upon the language of the section.

The section obviously was introduced in the interests of, and for the protection of, the owners of docks and canals. It is expressed in the most general language, and when attention is called to the facts which were proved in *The City of Edinburgh* (1) it is obvious that some limitation must be put upon the words of the section, otherwise there would be many cases in which the application of the section in its strict literal meaning would lead to absurdity. The question raised in this appeal is whether the limitation which must be put upon the general language of the section is a limitation to acts done by a dock or canal owner in his capacity as such or to acts done on his premises as an owner of a dock or canal; in other words whether the limitation is in reference to area or to the nature of the act done. Apart from authority I should have said that the natural limitation to be put upon the words of the section, having regard to its object and to the language used, would be a limitation in reference to area. If I had been asked to construe the section I think I should have read the words in this way: "The owners of any dock or canal or a harbour authority . . . . shall not, where without their actual fault or privity any loss is caused to any vessel or vessels, or to any goods, merchandise or other things whatsoever on board any vessel or vessels" (whilst being at or upon the dock or canal) "be liable to damages beyond an aggregate amount not exceeding" so much. I should have done that, I think, as a matter of first impression, feeling that it was obviously necessary to put some limitation on the general language of the section.

(1) [1921] P. 70, 274.

The one decision upon the language of this section—*The City of Edinburgh* (1)—was a decision in the first instance of Hill J., and afterwards of the Court of Appeal. The facts in that case were such that it was obvious that some limitation must be placed upon the language of the section. A ship repairing company owned a dock at Garston, and they were employed to repair a vessel in one of the Liverpool docks belonging to the Mersey Docks and Harbour Board. Damage was done to the vessel while she was being repaired, for which the ship repairers were liable. They accordingly sought to limit their liability under the general words of this section by saying: "It is true we are liable for the damage done to the vessel while we were repairing her in the dock at Liverpool, and that we do not own the dock or any docks at Liverpool, but we do in fact own a dock at Garston, and therefore the section applies, and we are entitled to the benefit of the limitation therein allowed." The claim only needs to be stated to show its absurdity, because it would apply not only to a case where the two places were as near together as Garston and Liverpool, but also where the places were as far apart as, e.g., the Tyne and Bristol. It is obviously absurd. The decision was that the section had no application to the facts of that case, and anything that may have been said in reference to the ground upon which the decision rested was not necessarily part of that decision. The argument in the Court of first instance on behalf of the defendants was that both classes of limitation should be placed upon the language of the section. Their counsel contended that the section did not give relief when the damage was occasioned outside the area over which the dockowners exercised control, and he also argued that it did not give relief where the negligence was not that of a servant of the dockowners qua dockowners. Neither Hill J. nor any of the Lords Justices expressed any decided opinion upon that point, i.e., they did not distinguish between the one qualification and the other, but they decided, speaking in general terms, that the section had no application. Speaking for myself, however, I think that the judgment of

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(1) [1921] P. 274.

Lord Sterndale M.R. indicates that he was proceeding on the footing that the limitation that he would adopt was a limitation in regard to area. It is true that Scrutton L.J. uses an expression which I think Hill J. in this case has construed as an expression of opinion that the Lord Justice's view was in favour of a limitation having reference to the nature of the act done; and the learned judge has gone further, I think, and has held that that view was the decision of the Court of Appeal.

On neither point, with respect to the learned judge, am I able to agree with him. In my opinion the decision of the Court of Appeal was not to that effect, and I do not think, reading Scrutton L.J.'s judgment as a whole, that his language was directed to that particular point. It is just as applicable to a restriction in respect of area as it is to a restriction in respect of the nature of the act, and I think therefore that I am neither bound nor guided by authority—in the direction indicated by the learned judge. So far as *The City of Edinburgh* (1) is a guide, I think it is a guide in favour of taking the view I have already said I should have taken without any authority at all. Having heard the arguments, in my opinion the qualification in respect of area is a necessary qualification and one which would lead to less difficulty than a limitation in respect of the nature of the act.

The facts in this case—as in many similar cases—are that the damage done to the vessel is done while she is in a dry dock owned by a firm who are not only dry dockowners but ship repairers. As Hill J. very properly says, the section presupposes a liability and limits it; while the vessel is in the dry dock something happens in respect of which the dry dockowners are in fact liable. In this particular case the vessel got on fire while she was in charge of the defendants as dockowners, and they are not in a position to show that it was not their fault. It seems to me that when a vessel under those circumstances is in a dry dock, and in charge of the owners of the dry dock who are doing

(1) [1921] P. 70, 274.

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work upon her as ship repairers, it is not possible to distinguish with any accuracy between the acts done qua ship repairers and the acts done qua dockowners as regards many of the necessary things which have to be done in the course of repairing the vessel. I think it would be introducing unnecessary confusion and difficulty in the construction of this section if a limitation were imposed having reference to the nature of the act done. It seems to me much simpler to apply the section with a limitation in respect of area, and much more probable also from the language used that that was the intention of the Legislature.

For these reasons, therefore, I am of opinion that the appeal should be allowed.

ATKIN L.J. I agree. We have to construe the words of s. 2 of the Act, and if one merely looks at the words of the section it appears to me that the plaintiffs in the limitation suit fall quite clearly within the plain words of the section: "The owners of any dock shall not, where without their actual fault or privity any loss or damage is caused to any vessel, be liable to damages beyond an aggregate amount" which is specified, and "dock" includes "dry dock." The plaintiffs are the owners of a dock, and loss or damage was caused to the vessel. On the other hand, it is plain that there has to be some limitation in the words of the section, because, as was pointed out in *The City of Edinburgh* (1), if the plain words of the section were applied one would be drawn into an absurdity. In that case the ship repairers owned a dock at Garston and executed some repairs upon a vessel lying in the Hornby Dock at Liverpool, and they contended that because they were the owners of the dock at Garston, and had done damage to the vessel at Liverpool, they were entitled to limit their liability. There was no relation between the ownership of the dock and the damage, either causal or geographical, and the construction contended for was held to be not within the plain meaning of the section. On the other hand the plain meaning of the words must

(1) [1921] P. 70, 274, 278.

not be cut down further than is necessary in order to avoid an absurdity. There is no question here of repugnancy to be considered. What is contended is that a further restriction ought to be put on the meaning of these words by reading into the section the words: "where damage is done by a dockowner in his capacity as dockowner," and for that contention *The City of Edinburgh* (1) is cited. It appears to me that the learned judge, with great respect, was going beyond the actual decision when he said that the Court of Appeal had laid down that proposition. Lord Sterndale said: "I should have said without the assistance I am going to refer to in a moment, that the section must refer to a limitation of liability of the dockowner as such—i.e., in respect of something in some way connected with his dock," and the help that he had been given was the suggestion that the dockowner was to be in the same position as the shipowner who gets a decree of limitation in respect of some injury or damage caused by other persons in some way relating to his ship. Then Scrutton L.J. used the words to which the learned judge imputes the burden of supporting the whole decision of the Court of Appeal, but in my view he is attaching too much weight to the words used by the Lord Justice in the connection in which he used them. The exact words of Scrutton L.J. were: "It appears to me to read these words as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity. In this case the repairs in the Hornby Dock had nothing to do with the ownership of a dock at Garston, and for that reason the Garston dockowners cannot limit their liability for what their boy did in the Hornby Dock ten miles off." I think I should read those words as meaning that the ship repairers who own a dock at Garston, while they might be protected under the statute in respect of ship repairing damage done at Garston, are not protected in respect of ship repairing damage in no way related to their dock, which they did at Hornby. But if the words are taken rather narrowly I prefer the language used by Lord

(1) [1921] P. 70, 274, 278.

Sterndale—namely, that it must be shown that the damage is in some way connected with the dock.

If the limitation is restricted to damage done by the owners' servants in their capacity as dockowners, I still think that the plaintiffs would be entitled to succeed; because, what is the capacity of the dockowner? One has to remember that the owners both of wet docks and dry docks perform different functions in their different capacities varying with the dock. One has only to refer to the interesting summary of the practice as to loading and discharging in various docks which used to be attached to Scrutton's Charterparties and Bills of Lading—a summary which now unfortunately has disappeared—to see that there has always been a considerable difference in practice so far as loading and discharging is concerned. Nearly all wet dockowners provide certain apparatus for loading and discharging. In some cases the cranes and hoists belong to the dock company and are worked by their servants. In other docks the dockowners do not perform any of the operations of either loading or discharging, and these operations are left to the stevedores employed by the shipowner or by the shipper, as the case may be. How is one to judge in those cases what is the capacity in which the loading or discharging is done? Is there a different capacity from that of dockowner—namely, that of loading or discharging vessels? It seems to me that would be a very narrow view, and that in the case of a dockowner who, as part of the business of dockowning, includes the duty of loading or discharging, he is loading or discharging in his capacity as dockowner. I apply the same reasoning to dry docks. There are dry docks where the dockowner does not execute any repairs at all, and where all that he does is to provide accommodation for a vessel which is then repaired by an independent firm of ship repairers. But there are numerous other cases—and cases undoubtedly in existence at the time of the passing of the Act of 1900—where the dry dockowner only became owner for the purpose of carrying on a business which includes the repairing of ships in the dock; and it appears to me that when he is carrying on that business he is in fact acting in the capacity of dry dockowner when he is doing that which the dry dockowner usually does—namely, repair ships. Applying therefore the test which the learned judge applied, it appears to me that the plaintiffs are entitled to their decree of limitation of liability. I would add that I am by no means prepared to accept the illustrations that the learned judge suggests as being plain indications of cases where the dockowner would not be liable for damage occurring in the dock. I do not wish to decide anything about them, because they may arise, but I am not prepared to assent to their being plain illustrations of exemption from the operation of the Act.

It is true that the construction I have indicated is attended by some anomalous results, for to some extent it no doubt is anomalous that the ship repairer should be entitled to limit his liability for the negligence of his servants when the negligence occurs in his own dock and not be so entitled when the negligence occurs in some other dock, though it may be close at hand. It is also anomalous that the shipowner who sends his ship to be repaired in a dry dock which is owned by the ship repairer may only be entitled to recover a small proportion of his damage, whereas, if he sends the ship to a dry dock which is not owned by the ship repairer, and engages a ship repairer to go to that dock to do the repairs, he can recover the full amount of the damage. The question, however, is whether those anomalies are so great as to amount to an absurdity and prevent us from giving the fullest effect that we can to the words of the statute, and I am not satisfied that they are so great. It may be that the Legislature had considered this matter fully. It may be, on the other hand, as sometimes happens, that they had not got these particular developments in mind. If they had, it is possible that they might on the one hand have said: "No, we do not intend this: we think that the section should be limited by some words which are not defined, but which more closely connect the damage with the actual and physical ownership of the dock"; or on the other hand they might have thought that it was not unreasonable to encourage the ownership of dry docks and the carrying on of a repairing business therein, and therefore, in so far as the ship repairer carries on his repairing business in a dock which he has provided, to give him the benefit of the limitation, but to refuse him the benefit if he carries on his business in a dock which he has not provided for the public benefit. I cannot say that such a provision is unreasonable and I certainly do not think that it is absurd. It appears to me, therefore, that construing this Act of Parliament as we ought to construe it, the plaintiffs are entitled to the benefit of the limitation of liability which they claim, and that the appeal should be allowed.

SARGANT L.J. I am of the same opinion. The plaintiffs are clearly within the actual terms of s. 2 of the Act of 1900. They are owners of a dock ; damage has been caused without their actual fault or privity to a vessel in their dock ; and it seems therefore that the words of the section, taken in their ordinary literal and grammatical meaning, are completely satisfied. The universal rule which Lord Wensleydale referred to in *Grey* v. *Pearson* (1) is that the grammatical and ordinary sense of the words is to be regarded, unless they lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the ordinary and grammatical sense of the words may be altered so as to avoid that absurdity or inconsistency, but no further.

In *The City of Edinburgh* (2), if the words of the section had been read without any limitation which would have excluded that case, there would have been a manifest absurdity, because the persons who sought to limit their liability as the owners of a dock had caused damage by something they had done ten miles off in some one else's dock, and something that was entirely unconnected with any ownership of the dock in respect of which they sought to claim exemption. In that case, therefore, Hill J., and afterwards the Court of Appeal, held that the words of the statute must be so limited as to prevent the dockowners being entitled to claim immunity through an ownership which was entirely disconnected with anything which had caused the damage. In my opinion the language used by Scrutton L.J. has not the meaning which has been suggested on behalf of the respondents. He says: " In this case it appears to me to read these words as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity." Clearly, what he means by " in any other capacity " is in a capacity altogether unconnected with his ownership of the dock. In that case there was a perfectly clear absurdity created by merely taking the absolute grammatical meaning of the words, and the Court accordingly rejected that construction and imposed a limitation on the words. But for the purpose of dealing with the present case I do not think that the language used in the judgments in *The City of Edinburgh* (1) is of much assistance, because we have to deal with a more difficult case and one where there is not such an absolute and entire disconnection or breach of continuity between the ownership of the dock and the damage which has occurred. One has, therefore, to look more narrowly at the language of the section. " The owners of any dock shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . ."—those words must, I think, mean " any vessel or vessels in their dock." They cannot possibly apply to vessels in a totally disconnected dock or on the high seas. From the language of the section itself, therefore, it is easy to impose such a limitation as that which was imposed in *The City of Edinburgh* (1), although that case was excluded on the ground of the manifest absurdity. In the case of a ship repairer who in the course of and for the purpose of his ship repairing business owns a dry dock and takes vessels into that dock and does repairs on them, is there any absurdity in holding that the exoneration of the section applies to loss or damage occurring to that vessel in the dry dock, the dock being used for the very purpose for which it was constructed ? It seems to me that so far

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(1) (1857) 6 H. L. C. 61, 106.

(2) [1921] P. 70, 274, 278.

(1) [1921] P. 70, 274, 278.

from there being any absurdity, there is not even an improbability that an exemption might be granted in such a case.

I agree with what Atkin L.J. has said, that although there may be anomalies created as between ship repairers who own the dock in which the repair is done and ship repairers who are working in other persons' docks, in the sense that the former class will be in a more favourable position than the latter class, such anomalies do not constitute an absurdity which renders it necessary to limit the Act of Parliament further than was done in *The City of Edinburgh.* (1) I agree therefore that the appeal should be allowed.

Carpmael. On the question of costs, in the ordinary limitation suit the plaintiff, seeking to obtain the advantage of a decree of limitation of liability, has to pay the costs other than costs incurred by reason of the defendant having raised unreasonably issues on which he has failed : see Roscoe's Admiralty Practice, 4th ed., p. 287, and *The Kathleen* (2), a case not in the appellants' favour, as although the plaintiffs succeeded the President condemned them in the costs of a very protracted inquiry. It is, however, a matter for the discretion of the Court, depending in the present case on whether the Court thinks the defendants acted reasonably in raising the issue that the plaintiffs did not come within the protection of the section.

Pilcher. The contention that the defendants acted reasonably in contesting the plaintiffs' claim to a decree of limitation is strengthened by the fact that the learned judge decided in their favour.

BANKES L.J. We think that the order that the plaintiffs should pay the costs so far as the Court below is concerned should not be disturbed, but the respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants : *Pritchard & Sons.*
Solicitors for the respondents : *William A. Crump & Son.*

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(1) [1921] P. 274.

(2) Post, p. 63.

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THE KATHLEEN.

NOTE.

THE KATHLEEN.

In this case the owners of the steamship *Kathleen* sought to limit their liability under the provisions of s. 503 of the Merchant Shipping Act, 1894, in respect of a collision between the *Kathleen* and the lock gates at Barton Lock in the Manchester Ship Canal on November 9, 1923. The *Kathleen's* engines failed to work astern, and she crashed through the lock gates and dropped some fifteen feet into the water below. In an action by the Canal Co. against the shipowners the *Kathleen* was held alone to blame. In the present action the plaintiffs admitted that the collision was caused by negligence, but alleged that it occurred without their actual fault or privity, and claimed to limit their liability to the sum of 5346*l*., the amount for which they would be liable at 8*l*. per ton on the ship's tonnage in accordance with the limitation sections of the Merchant Shipping Act, 1894. The defendants, the Canal Co., denied that the collision occurred without the actual fault or privity of the plaintiffs, alleged that it was caused or contributed to by the defective condition of the *Kathleen's* engines, and that the plaintiffs knew or ought to have known of the condition of the engines. At the hearing, which lasted thirteen days, the particular defect alleged was a defect in the piston valve and valve chamber of the H.P. engine, and a large body of expert evidence was given by both parties.

The President (Lord Merrivale) in his considered judgment, delivered on May 12, 1925, found that the valve was defective, but that its condition existed without the actual fault or privity of the plaintiffs, and that accordingly they were entitled to a decree of limitation of liability.

Sir Leslie Scott K.C., *Stephens K.C.* and *Langton* for the plaintiffs. Having raised contentious issues which have been fought at great length and expense, the defendants should pay the costs of those issues; the plaintiffs ought merely to pay the ordinary limitation costs which would be incurred if no controversial issues had been raised.

Dunlop K.C., *Balloch* and *G. St. C. Pilcher* for the defendants. Following the ordinary rule the plaintiffs ought to bear the whole of the costs of obtaining their decree of limitation of liability, unless the Court is of opinion that the defendants have acted unreasonably in putting the plaintiffs to the proof of their claim that the damage happened without their actual fault or privity: see Roscoe's Admiralty Practice, 4th ed., p. 287, and the cases there cited, and *The Charlotte* (1), where Hill J. applied this test and gave effect to the ordinary rule. In fact the hearing was unduly protracted by reason of the plaintiffs' denial that the engines were defective, and on this issue they failed.

The President: Applying the test which Hill J. applied in *The Charlotte* (1), it is impossible for me to say that the defendants were unreasonable in the course they took, and I do not see my way to vary the general rule that the party seeking relief must pay the whole of the costs of the limitation proceedings.

Solicitors for the plaintiffs: *Charles Lightbound & Co.*
Solicitors for the defendants: *Hill, Dickinson & Co., Liverpool.*

E. C. M. T.

(1) (1921) 9 Ll. L. Rep. 341.

Applied. GUNNER *v.* GUNNER AND STIRLING. [1948] 2 All E.R. 771.

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[IN THE COURT OF APPEAL.]

BOSWORTHICK *v.* BOSWORTHICK.

Divorce—Variation of post-nuptial Settlement—Guilty Husband—Bond by Wife to secure present Payment of Annuity to Husband—Bond discharged —Matrimonial Causes Act, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5*—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

By a bond executed by her in 1902, a wife, married in 1897, secured to her husband an immediate annuity of 300*l.* for his life. The marriage was dissolved in 1925, on the petition of the wife, who then applied for an order extinguishing her liability under the bond:—

Held, that a liberal interpretation according to their obvious purpose must be given to s. 5 of the Matrimonial Causes Act, 1859, and s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that although the bond did not involve the settlement of property, or a charge on property, for successive interests, it nevertheless amounted to a post-nuptial settlement within the meaning of those sections, and that the Court had power, consequent upon the dissolution of the marriage, to deal with the bond and discharge it.

Dormer v. *Ward* [1901] P. 20 applied.

Decision of Lord Merrivale P. [1926] P. 159 affirmed.

APPEAL from Lord Merrivale P. (1)

A wife married in 1897, and possessing a life interest in considerable property under a settlement made by her uncle and his will, by a bond, dated December 23, 1902, secured to her husband an immediate annuity of 300*l.* for life, and by a deed poll dated January 30, 1903, appointed to him a reversionary annuity, expectant on her death, of 600*l.*

On January 12, 1925, the marriage was dissolved on the wife's petition on the ground of her husband's adultery. The wife then petitioned for an order extinguishing her liability under the bond and her husband's interest under the appointment. There were some arrears due to the husband under the bond.

The registrar had reported that the appointments by the wife were not post-nuptial settlements within the meaning of the Acts.

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(1) [1926] P. 159.

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On a motion to confirm the report Lord Merrivale P. held that the bond and the deed of appointment were settlements within the meaning of the Matrimonial Causes Act, 1859, s. 5, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and made an order that upon satisfaction of the arrears, the obligation of the wife under the bond must be held to be discharged, and that she should be at liberty in the event of her remarriage to appoint to the intended husband an interest to take effect in priority to the interest appointed to the respondent.

The husband appealed against the discharge of the bond.

The appeal was heard on July 13 and 14, 1926.

Hewitt K.C. and *F. L. C. Hodson* for the appellant. Two requisites must be fulfilled in order that the power given by the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, and re-enacted by the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192, may come into operation: (1.) there must be a settlement and (2.) there must be property settled. Here it is submitted the respondent does not show the existence of any settlement. What is suggested to be a settlement does not come within any of the recognized definitions of a settlement: see Halsbury's Laws of England, vol. 25, p. 526. There is no definition of settlement in the Act of 1859, but the definitions in the Settled Land Acts and the Bankruptcy Act, 1914, are of assistance. In this case there are no trusts, no successive interests, and no settled property or charge upon property. There is nothing limited to persons by way of succession. In *Loraine* v. *Loraine and Murphy* (1) Cozens-Hardy M.R. said: "This power conferred by s. 5 of the Act of 1859 is a power enabling the Court in terms to vary and alter settlements, and settlements only, made either before or after the marriage of the husband and wife whose marriage is in question." Here there is only a bond for payment of an annuity which is not a settlement.

The precise point in this case has not arisen before. The nearest approach to it has been in cases under separation

(1) [1912] P. 222, 228.

deeds; but there is a wide distinction between them and the present case.

In *Callwell* v. *Callwell* (1), where a covenant for an annuity made in contemplation of marriage was held to be an ante-nuptial settlement, there was a marriage settlement as well from which the covenant could not be dissociated. In *Gill* v. *Gill* (2) the only question was who was to bear the costs of varying the settlement.

In *Worsley* v. *Worsley* (3) it was held that all deeds, whereby property was settled upon a woman in her character as wife, and to be paid to her whilst she continued a wife, came within the scope of s. 5 of the Act of 1859, and that the Court had power to deal with them.

Sykes v. *Sykes* (4) was a case where there was a marriage settlement, and is only reported on the point whether it was possible to vary one of the terms in a particular manner. The case did not come before the Court on the question whether or not there was a settlement. It has therefore no bearing on the present case.

In *Kane* v. *Kane* (5) there was a covenant in a marriage settlement to settle after-acquired property, and Hall V.-C. said: "I am of opinion that this legacy was otherwise settled previously . . . . and that it is excluded from the operation of the covenant in the settlement." The same point was raised before Parker J. in *Lloyd* v. *Prichard* (6).

[SCRUTTON L.J. *Jump* v. *Jump* (7) does not deal with the question whether a promise to pay is a settlement.]

In *Clifford* v. *Clifford* (8) there was no argument as to whether a covenant amounted to a settlement. *Chalmers* v. *Chalmers* (9) shows that there must be a trust or a settlement. In *Hubbard* v. *Hubbard* (10) the post-nuptial assignment of a leasehold house was held not to be a settlement at all.

Sect. 5 says that the Court may inquire into the existence of a settlement "made on the parties," not on "either of

(1) (1860) 3 Sw. & Tr. 259.
(2) (1863) 3 Sw. & Tr. 359.
(3) (1869) L. R. 1 P. & M. 648.
(4) (1870) L. R. 2 P. & M. 163.
(5) (1880) 16 Ch. D. 207, 210.
(6) [1908] 1 Ch. 265.
(7) (1883) 8 P. D. 159.
(8) (1884) 9 P. D. 76.
(9) (1893) 68 L. T. 28.
(10) [1901] P. 157.

them." This bond is only a personal obligation, the subject of an action for payment. It is not a provision at all for "the parties," and the section unless altered would not extend to this case.

[SCRUTTON L.J. In *Dormer* v. *Ward* (1) there was a personal covenant which the Court treated as a settlement within s. 5.]

But there was a proper and very full settlement as well in that case, and the personal covenant was only a part of that settlement which clearly came within s. 5. There must be property or a charge on property included in the settlement.

There have been trustees in all the cases except in *Saunders* v. *Saunders and Beck* (2), which, however, was a separation deed, and the point that it was not a settlement was not argued. *Stone* v. *Stone* (3) was also a case of a separation deed.

Hawke K.C. and *J. L. Pratt* for the respondent were not called upon.

LORD HANWORTH M.R. This appeal raises an interesting point which has been illustrated in a great number of cases to which our attention has been called. The question is whether or not we have power to deal with a bond which was executed on December 23, 1902, by a wife in favour of her husband, by which she undertook to pay him 300*l*. a year with a penalty attached on non-performance. The bond was given at a time when the marriage was subsisting, and the President tells us in his judgment, after the report had been made to him by the registrar, that there was no other consideration for that undertaking than the relationship between the parties of husband and wife. In 1925 there was a decree absolute, and after that an application for variation of what is said to be a settlement, including this post-nuptial bond.

The learned President has taken pains to go through the history of the legislation on the subject, and after considering

(1) [1901] P. 20.

(2) (1893) 69 L. T. 498.

(3) (1864) 3 Sw. & Tr. 372.

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all the authorities, he has come to the conclusion that he had jurisdiction to treat this bond as a post-nuptial settlement, and to vary it by cancelling the husband's interest. The jurisdiction originally depended upon s. 5 of the Matrimonial Causes Act, 1859, which was varied by s. 3 of the Act of 1878, and those sections are reproduced in s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.

It is said that on the facts of this case the Court has no jurisdiction to entertain an application to deal with this bond, because it is not a post-nuptial settlement; that what s. 192 refers to is an ante-nuptial or post-nuptial settlement whereby property is settled, and that whatever meaning you give to the word "settlement" a bond of this sort is not a settlement, and, more than that, it is not charged on any property; and that the words of s. 192 show that the word "settlement" refers to property or something charged on some property which can be dealt with. I think that the section to which I have referred must be looked at, and that one gets no light from looking at other Acts dealing with settlements. It is quite plain that the Bankruptcy Act, for instance, takes special powers to deal with settlements which do not apply to a case like this.

The learned President has examined various authorities which deal with the interpretation of the sections to which I have referred, but I think that there is one case which binds this Court and by reason of which the appeal must be dismissed. I desire first to refer to two or three cases which have been mentioned. It is not unimportant to see that at a very early stage, within a few years of the passing of the Act of 1859, Lord Penzance, referring to s. 5 of that Act, said in *Stone* v. *Stone and Brownrigg* (1): "I am not prepared to say that the separation deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled, and I think the section should be liberally construed." I agree with that statement. A consideration of the authorities would appear to show that the object of s. 5 of the Act of 1859, passed two years after the Divorce Act of 1857, was for the purpose of meeting the difficulty which had arisen from the fact that although the marriage had been dissolved yet the parties remained bound by the nexus of the settlement of their property, and it was with reference to that property that s. 5 was passed. I will next refer to *Worsley* v. *Worsley and Wignall* (1), in which the same learned judge said with reference to the same section: "The legislature has made use of very general terms. 'The Court may inquire into the existence of ante-nuptial and post-nuptial settlements made on the parties whose marriage is the subject of a decree, and may make orders with reference to the application of the whole or a portion of the property settled.' The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife."

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(1) 3 Sw. & Tr. 372, 373.

I need not go through a great number of other authorities, but I think that it will be found that in cases where payments have to be made by one spouse to the other in the character of a spouse, the Court, after the marriage has been dissolved, has intervened to deal with it as might be just between the parties, and here we have this bond entered into in consideration of the relationship of the parties by the wife in favour of the husband as husband.

Following upon a number of other decisions, there is *Dormer* v. *Ward* (2) in this Court, which was an application to vary a settlement comprising a covenant by the husband to pay a yearly sum of 200*l.* to the wife during their joint lives. Mr. Hewitt says that the door was open in that case to vary the covenant, because there was also settled property included in the settlement. With regard to the

(1) L. R. 1 P. & M. 648, 650.

(2) [1901] P. 20, 34.

covenant to pay the annuity, it was contended that there was no settlement except by the owner of a limited estate subject to powers; that there was a great distinction for that purpose between property and power; and that the covenant for payment of the 200*l.* per annum merely created a debt, and was not property settled upon the wife who was the petitioner. In dealing with that contention—and it is quite plain from the report that the Court dealt seriatim with the liabilities under the settlement—Vaughan Williams L.J. said: "It seems to me that the right, and the only right, of the petitioner in respect of this covenant is to apply to the Court under s. 5 to make an order for the application of this 200*l.* for her benefit. This, of course, is pro tanto to vary the settlement, because, unless there was a valid marriage, she, in my judgment, is not entitled to the benefit of the covenant. She could not recover on the covenant unless varied, but I think, for reasons which I have already given, that the Court in case of a decree of nullity can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of 200*l.*" It is quite clear, therefore, that the Court dealt with that covenant separately, and although the jurisdiction of the Court was contested, yet the Court held that it had power to deal with the covenant. That decision has the greater authority because the case had already been before Gorell Barnes J. in the Court below (1), and he had decided that "property settled" within the meaning of s. 5 of the Act of 1859 and s. 3 of the Act of 1878 referred only to that particular property the benefit of which was, by the marriage settlement, conferred in the ordinary way on the parties or their children, and he had rejected jurisdiction in respect of the covenant. He appears to have taken the view that the covenant merely created a debt, and that he ought not to make an order dealing with it. But on appeal, in spite of the argument urged in support of the decision in the Court

(1) [1900] P. 130.

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below, the Court of Appeal held that it had jurisdiction to deal with the covenant apart from the settlement, and if we were to hold that there was no jurisdiction in the present case, I think that we should be running counter to the decision of this Court in *Dormer* v. *Ward* (1), which we cannot do.

On consideration of the authorities, the ground of my decision is that the section is to be construed liberally and widely, and I do not intend to narrow the meaning of the word "settlement."

The appeal must be dismissed.

Scrutton L.J. A wife agreed under seal to pay her husband 300l. a year during his life. The marriage has been dissolved, and the question before the Court is whether under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court has jurisdiction to alter that covenant to pay. That question depends upon whether this particular deed is a post-nuptial settlement, and whether the annuity of 300*l.* is property settled for the benefit of the parties for life.

About what we might have done if there had been no authority on this point, I decline to speculate, but I think that the ordinary Chancery barrister would have recoiled from the proposition that a deed containing a covenant to pay 300*l.* per annum was a settlement of property. There are a series of decisions in the Divorce Court to show that a much wider meaning has been given to the word "settlement" than it has received in equity. In *Dormer* v. *Ward* (1) this Court held that a covenant to pay a yearly sum constituted settled property the disposition of which could be varied under the Acts empowering the Court to vary settlements, and the Court rejected the argument that the covenant merely created a debt. That authority binds this Court to say that the learned President was correct in holding that he had jurisdiction and that his decision must be affirmed.

I desire also to say that there is a decision of this Court in *Hubbard* v. *Hubbard* (2) in which a post-nuptial assignment

(1) [1901] P. 20.

(2) [1901] P. 157.

of a leasehold house by a husband by way of provision for his wife was held not to be a "settlement" within s. 5 of the Act of 1859, and that I can quite well foresee that the Court will some day be confronted by a case which is midway between that case and this—for instance, a case where promissory notes are given to secure a series of payments—and the Court will then have to say upon what principle a case of that character must be decided.

Romer J. I agree. I do not think we get any assistance from the Settled Land Act or the Bankruptcy Act, or from the way in which the word "settlement" is usually employed by conveyancers. What we have to do is to consider the meaning of the word in these particular sections. We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this Court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the Legislature.

Appeal dismissed.

Solicitors for appellant: *Law & Worssam, for Rundle & McDonald, Devonport.*

Solicitor for respondent: *C. R. A. Edwards.*

R. M.

ADMIRALTY.

1926
June 14;
July 9, 26.

THE STREAM FISHER.

Shipping—Collisions—Maritime Liens—Priorities—Ranking.

Where there has been more than one collision with the same vessel the maritime liens arising thereout, apart from laches, rank pari passu and not in the order of the dates of the respective collisions.

THIS was a motion to determine the priorities between four rival claimants in respect of damage arising out of four separate collisions with the defendants' steamship *Stream Fisher*. All the actions were in rem, and the *Stream Fisher* had been arrested and sold under the order of the Court. The proceeds, 827*l*. 16*s*. 6*d*., were insufficient to satisfy the claims.

The claimants, in order of date, were as follows:—

(*a*) The master of the sailing barge *Squawk*, in respect of his effects lost by reason of a collision with the *Stream Fisher* on November 23, 1924. The collision action by the owners of the *Squawk* had been settled, and the master did not commence his action until October 7, 1925. He obtained judgment for 86*l*. 3*s*. 4*d*. on March 22, 1926.

(*b*) The owners of the steam tug *Criterion*, which had a collision with the *Stream Fisher* on February 6, 1925. Proceedings were commenced on May 26, 1925, and judgment obtained on April 22, 1926, for 154*l*. 4*s*.

(*c*) The owners of the steam tug *Enable*, which had a collision with the *Stream Fisher* on February 7, 1925. Proceedings were commenced on February 10, and judgment for 180*l*. was obtained on April 22, 1925.

(*d*) The owners of the steamship *Roi Leopold* in respect of a collision with the *Stream Fisher* also on February 7, 1925, but later in the day than the *Enable*'s collision. The writ was issued on February 10, and the defendants filed an admission of liability. On May 24, 1926, the claim of these plaintiffs was agreed at 1173*l*. 3*s*. 10*d*.

Carpmael for the owners of the *Criterion* and the owners of the *Enable*. There is no direct English authority on the point, but it is submitted that in the case of successive collisions with the same ship the sufferers by the earlier collision are preferred. This was the view taken by Mr. Maclachlan in the first edition (1860) of his treatise on Merchant Shipping; by the authors of the later editions of Abbott; and by the author of Part XVII. "Shipping and Navigation" of Halsbury's Laws of England, vol. xxvi., p. 622, where *The Hope* (1) is cited as the authority. That case, however, is merely authority for the proposition that rewards for services rendered rank in the inverse order of their attachment. In the first edition of Marsden's Collisions at Sea (1880) it is stated (p. 49) that where there are several claimants for damages in separate actions in rem in respect of the same collision they rank in the order of their judgments; but that view is based on the decisions in *The Saracen* (2) and *The Clara* (3), which are of no authority at the present time, as the decrees were unconditional and not, as in modern practice, reserving priorities: see *The Africano* (4) and *The James W. Elwell*. (5) Necessaries men were always treated on a different footing and shared rateably, even before the decision in *The Henrich Björn* (6), when it was thought that such claimants had a maritime lien (*The Desdemona* (7); *The West Friesland* (8)): but these were the only claims which were not dealt with on some system of priority. In Carver's Carriage of Goods by Sea, after enumerating the various claims which give rise to maritime liens, including those which arise ex delicto, it is stated that the broad rule is that such liens rank inversely in the order of date (s. 320), and *The Aline* (9) and *The Veritas* (10) are cited. The former, however, was a case of bottomry and the latter merely a decision that a damage lien is preferred to an earlier salvage lien, because the former arises ex delicto.

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(1) (1873) 1 Asp. M. L. C. 563.
(2) (1847) 6 Moo. P. C. 56.
(3) (1855) Swa. 1.
(4) [1894] P. 141.
(5) [1921] P. 351.
(6) (1886) 11 App. Cas. 270.
(7) (1856) Swa. 158.
(8) (1859) Swa. 454.
(9) (1839) 1 W. Rob. 111.
(10) [1901] P. 304.

In *The Bold Buccleugh* (1), *The Ripon City* (2), and *The Tervaete* (3) the nature of a maritime lien was fully discussed, and the last case shows that the damage lien attaches at the moment the damage is done. The *Stream Fisher*, therefore, was a vessel sailing the seas with liens already attaching to her before the collision with the *Roi Leopold*, and accordingly that claim should be postponed to those of the earlier sufferers. There do not appear to be any Scottish decisions in point, but two at least of the American decisions favour the view for which these claimants contend: see *The Frank G. Fowler* (4) and the observations of Brown J. in *The J. W. Tucker*. (5) The order of priorities therefore should be: (i.) the marshal's charges and expenses; (ii.) the costs of the owners of the *Enable* (in whose action the vessel was sold) in respect of bringing the fund into Court; (iii.) the damage claims of the respective plaintiffs in the order of the dates of the collisions; (iv.) disbursements.

[Reference was also made to *The Neptune* (6); *The Linda Flor* (7); *The Benares* (8); *The William F. Safford* (9); *The Gustaf* (10); *The Markland* (11); *The Two Ellens* (12); *The Elin* (13); and *The Rio Tinto*. (14)]

Brightman, for the master of the *Squawk*, also argued that the liens ranked in the order of the dates of the respective collisions.

Stranger for the owners of the *Roi Leopold*. If the claimants in respect of the earlier collisions are right a vessel already encumbered with a lien for damage by collision to an amount exceeding her value could sail the seas with impunity, at any rate for the period of the two years allowed by the Maritime Conventions Act for bringing an action. So far as the *Squawk's* collision is concerned, by taking no steps to enforce his lien, the master enabled the defendants to

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(1) (1851) 7 Moo. P. C. 267.
(2) [1897] P. 226.
(3) [1922] P. 259.
(4) (1883) 17 Fed. Rep. 653.
(5) (1884) 20 Fed. Rep. 129, 133.
(6) (1835) 3 Knapp, P. C. 94.
(7) (1857) Swa. 309.
(8) (1850) 7 N. of C. (Supp.) 50.
(9) (1860) Lush. 69.
(10) (1862) Lush. 506.
(11) (1871) L. R. 3 A. & E. 340.
(12) (1872) L. R. 4 P. C. 161.
(13) (1882) 8 P. D. 39.
(14) (1883) 9 App. Cas. 356.

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THE STREAM FISHER.

create further liens, and he has been guilty of laches. Priority ranks on diligence: *The Africano.* (1) The proper view as regards damage liens inter se either is, as Mr. Carver thought, that they rank in their inverse order, or, more equitably perhaps, that (apart from laches) they rank pari passu. The whole reasoning of the judgment of Sir Francis Jeune in *The Africano* (1) supports the latter view. All maritime liens are the same, and there is no English authority to the effect that the earlier lien has priority. The statement originally found in Maclachlan's Merchant Shipping, and adopted therefrom in other text-books, may be derived from the American case of *The Jerusalem* (2), which was the basis of the observations of Brown J. in *The J. W. Tucker* (3) that the first in point of time is first in right. That may, however, mean first in taking proceedings and subject to equitable considerations. Judicial opinion in America is divided, but the Cyclopædia of Law, vol. xxvi., p. 809, after referring to *The Frank G. Fowler* (4) and *The John G. Stevens* (5), a case not directly in point, states that "the view that the last tort lien is to be preferred seems best sustained by principle."

Cur. adv. vult.

1926. July 26. BATESON J. This is a motion to settle priorities, if any, between four claimants for damages by four collisions on four separate occasions. The actions were all in rem and the res has been sold, but the proceeds are not sufficient to satisfy all the four claims. [His Lordship stated the facts set out above and continued:] No one contended that any date was material except the dates of the respective collisions. Mr. Carpmael and Mr. Brightman for the claimants in the first three collisions contended that their claims ranked in order of date of the respective collisions. Mr. Stranger contended either that they should rank in inverse order or at any rate pari passu.

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(1) [1894] P. 141.
(2) (1815) 2 Gall. 345.
(3) (1884) 20 Fed. Rep. 129, 133.
(4) 8 Fed. Rep. 331; 17 Fed. Rep. 653.
(5) (1897) 170 U. S. 113.

In my judgment the claims rank pari passu. There is no English authority for Mr. Carpmael's and Mr. Brightman's contention, except the following passage in Maclachlan's Merchant Shipping, 1st ed., p. 598: "Liens in the nature of reparation for wrong done, usually arise out of collision, and form the subject of proceedings in damage causes. They have their origin in positive law, and in the policy of quieting strife by distributing compensation for injuries done at the expense of the wrongdoer. They are severally co-extensive in point of right with the value of the ship and the gross amount of the freight being earned; they furnish, therefore, to sundry sufferers by the same collision the claim to rank equally and share pro rata in the common fund. Of two successive collisions with the same ship, the sufferers by the earlier standing to the sufferers by the later in no relation of demerit or obligation, retain their priority of claim against the fund, on the principle of the legal maxim: Qui prior in tempore, potior est in jure."

Mr. Carpmael argued that that passage meant that whoever was first in time had priority. No authority is cited for that proposition in the original edition of Maclachlan, and nowhere else is that statement supported. Abbott's Merchant Shipping contains no support for it in the editions by him, though a passage does appear in the fourteenth edition in which the authors say that "maritime liens ex delicto rank in the order of their attachment," and cite as the authority *The Hope* (1); but when that case is looked into it does not support that view. At p. 1027, in dealing with *The Elin* (2), a case as to wages subsequent to a collision, they say: "There seems, however, to be no decision that such a claim is to be postponed if the seamen, from the bankruptcy of the owner, or some similar cause, have no other remedy for the recovery of what is due to them." In the learned authors' opinion, therefore, the question of seamen's wages on a bankruptcy might easily be preferred to a collision lien. In Halsbury's Laws of England the author of the shipping portion of that work repeats that passage

(1) 1 Asp. M. L. C. 563.

(2) 8 P. D. 39, 129.

from Abbott and again cites *The Hope.* (1) No authority in support of the proposition could be found by counsel in the Scottish cases. There is some support in two cases—one in an American District Court and one to some extent in one of the Circuit Courts; elsewhere there is authority to the contrary. I will deal with the American cases later.

Mr. Stranger pointed out that there was authority to the contrary in Mr. Carver's Carriage of Goods by Sea. In s. 320 in dealing with priority of creditors on a ship he (2) states what the maritime liens are, including damage done by the ship, and the broad rule he says is: "that among themselves these claims rank inversely to their order of date. The last come first. One ground for this is, that claims for services which have conserved the res should come before earlier charges upon the res which have been thereby preserved. Another ground is that one who has a lien on the ship holds that subject to the chances of the ship's voyage, which may give rise to fresh liens. The lien is ordinarily a charge upon a ship in course of an adventure, not upon a ship in safety. Whether willingly or unwillingly the holder of it has become a party to the adventure; and may properly be considered to take the risks of it, as against those who may render services to the adventure, or who may suffer by the negligent conduct of it."

The other books I have consulted give no support to Mr. Carpmael's and Mr. Brightman's contention. Mr. Roscoe, in the fourth edition of his Admiralty Practice, p. 117, says: "Liens arising ex delicto take precedence over prior liens arising ex contractu, including salvage, and in respect of damage claimants inter se their claims in actions in rem, based on lien, in respect of the same collision, rank in the order of the judgments; for on obtaining judgment in a damage action the lien may be enforced to the exclusion of another damage claimant subsequently instituting his action even on the same day, but if instituted before judgment the damage is assessed rateably." He cites for that *The Clara* (1) and *The Africano.* (2) In Williams & Bruce I can find nothing to support the argument of the first claimants. Williams & Bruce is a mine of learning and knowledge in all matters connected with Admiralty: see pp. 85, 289, and 312. Nor can I find any support for it in Marsden's Collisions at Sea, from the first edition downwards. On p. 91 of the last edition (which I think is merely a repetition of the earlier editions) it is stated: "Where several claimants for damages in several actions in rem in respect of the same collision obtain successive judgments against the ship, their respective liens are enforceable against the ship in the order of the judgments. A plaintiff who institutes his action after another has been instituted, but before judgment, is entitled to damages rateably with the plaintiff in the earlier action."

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(1) 1 Asp. M. L. C. 563.

(2) The statement, in slightly different language, appears in the last edition (the 4th, 1905) for which the late Mr. Carver was responsible, as well as in the later editions.

Mr. Stranger further contended that all maritime liens are the same, and that the Court has never held that the order of date of the lien arising gives any priority. If one maritime lien does, one would suppose that all would. He also relied on the principles and reasoning in *The Africano* (2), and on the fact that the arguments and decisions in the great number of priority cases were unnecessary if the contention of the claimants in respect of the earlier collisions was right. In my judgment, all maritime liens are the same. They are defined in *The Bold Buccleugh.* (3) It is to be noted that in those days it was thought that the maritime lien was "the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process." In later times that has been held not to be so; but in the old days I have very little doubt myself

(1) Swa. 1.
(2) [1894] P. 141.
(3) 7 Moo. P. C. 267, 284, 285.

that the two things were the same. Then: "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

Throughout that judgment what is being considered is the position between the owners of the res and the person who has suffered damage; it is not a question of priority between two persons who have suffered damage. The judgment goes on to cite *The Aline* (1), which seems to be the foundation of the argument of Mr. Carpmael: "So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction." *The Aline* (1) was a case of preference of a bondholder, and that passage seems to me to make it obvious that the damage lien does not necessarily take priority even of bottomry. Therefore there is no magic in the first attachment of the lien.

In *The Ripon City* (2) Gorell Barnes J. says: "Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a jus in re alienâ. It is, so to speak, a subtraction from the absolute property of the owner in the thing." Then he goes on to deal with the facts of that case as showing that the right must be a right against the owner as well as against the res. In *The Tervaete* (3) Scrutton L.J. says: "The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. . . . . But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable,

(1) 1 W. Rob. 111.
(2) [1897] P. 226, 242.
(3) [1922] P. 259, 270, 274.

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a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after the collision takes the ship subject to this possibility of claim." The Lord Justice is not there considering priority of claims inter se; he is considering priority of claim as against the owner. He also says: "To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government." There again he is speaking of the subtraction from the property of the owner. Atkin L.J. says: "It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a Court of law to have the ship seized, and, if necessary, sold." There also, what the Court was considering was a claim as against the owner of the res and not a claim involving competing liens. *The Tervaete* (1), however, is an interesting case as showing that the maritime lien does not necessarily always attach for damage to a ship, because in that case, the vessel being owned by a foreign sovereign, there was no claim at all. I see no indication in any of these cases of any difference between one maritime lien and another.

Before dealing with the priority cases I must refer to the necessaries cases. Up to 1840, a person who had supplied necessaries within the body of a county had no remedy in the Admiralty Court. The Admiralty Act of 1840 gave in certain cases jurisdiction in rem over claims for necessaries. Following *The Bold Buccleugh* (2) necessaries men under the Act were held to have maritime liens; and so it was for something like forty years: see, e.g., *The West Friesland.* (3) Such was the law down to 1886, when *The Henrich Björn* (4) was decided. That decision was that claimants for necessaries had no maritime lien. The treatment of priorities in

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(1) [1922] P. 259, 270, 274.

(2) 7 Moo. P. C. 267.

(3) Swa. 454.

(4) 11 App. Cas. 270.

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necessaries cases during that period of enjoyment of a maritime lien is, however, quite instructive. I could not follow Mr. Carpmael's argument that the maritime lien in a necessaries case was different from any other maritime lien.

Questions of priorities have constantly arisen and been decided; but so far as I know no similar case of separate claimants for damage by separate collisions, as distinguished from separate claimants for damage by the same collision, has ever been raised and decided, although one would think it would have occurred. Two or three collisions are common. Not long ago there was a case of five collisions with the same vessel, followed by a limitation suit. Moreover, the eminent solicitors acting for the plaintiffs in the second, third and fourth collisions here both thought—I say " both," because there were only two solicitors—that a rateable distribution was the right one, and so stated in their letters which were put in.

The priority cases divide themselves into two groups: (1.) competing claims in the same cause of action; and (2.) competing claims in different causes of action. One finds that in these cases the rule is not always the same. It has always been held that necessaries men shared pari passu excepting where one had got priority of decree. Salvage is in inverse order; bottomry is in inverse order. Wages, I think, are pari passu, although I do not know that the question has ever been definitely raised. My attention was not drawn to any case where one seaman had served and earned wages long before another seaman, and as far as I know they have always been treated as sharing pari passu: see *The Salacia.* (1) Where the causes of action have been different, equitable grounds have been relied upon to give various priorities according to what was thought to be right. In necessaries and damage cases, priority of decree was the only priority ever argued or recognized. It is significant that date of supply or date of damage was never suggested: see *The Clara* (2); *The Desdemona* (3); *The William*

(1) (1862) Lush. 578.

(2) Swa. 1.

(3) Swa. 158.

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F. Safford (1); and *The Saracen.* (2) In salvage, the later salvor was always preferred to the earlier. That was on equitable grounds; because the later salvor made it possible that the earlier salvor should get payment.

I have not dealt with the master's lien for wages and disbursements. That, of course, stood on rather a different footing, because the master was occasionally postponed to the seamen. Subsequently his lien for disbursements was statutory.

The damage lien generally was treated as coming first, but not always: the reason being that all the other claims were with regard to voluntary dealings with the ship. Cases other than damage claims were described as arising out of contract or quasi-contract; salvage (apart from a bargain to salve) is not contract at all. As between bottomry and wages, equitable grounds gave sometimes one and sometimes another priority: see *The Veritas* (3); *The Union* (4); and *The Gustaf.* (5) In *The Gustaf* (5) the shipwright who had a possessory lien was preferred to the necessaries man. Lastly, in damage cases where the damage claimants in respect of the same collision are competing, for example, ship and cargo, it was decree that gave priority. Otherwise they must rank pari passu, although it may well be that the damage to the cargo occurred later than the damage to the ship.

The result as to ranking of lien seems to be this. First, you could get priority if you obtained judgment first. Secondly, you could get priority by later lien, as in salvage and bottomry; and thirdly, there were the cases where the claims rank pari passu. The first system of distribution is not contended for by any of the claimants, probably because all judgments are now given subject to the question of priority being determined hereafter. I see no reason to apply priority in inverse order—that is, by the later lien—except possibly as to the *Squawk*, owing to the delay. The master of the

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(1) Lush. 69.

(2) 4 N. of C. 498; 6 Moo. P. C. 56.

(3) [1901] P. 304, 310, 312 et seq.

(4) (1860) Lush. 128.

(5) Lush. 506.

Squawk could quite well have put forward his case at the same time as his owners put forward theirs, and either have got bail or have got paid. But, as regards the other three collisions, which all happened within a very short time of each other—in one case only a few hours, and in the other case only a few days—I do not think it would be equitable or fair to give any priority. With regard to the *Squawk*, if I had to decide whether there were laches or not, I should want to have all the facts before me. If anybody had to be postponed, certainly a man who waited as long as the master of the *Squawk* did would have to be postponed, because he had an option for some considerable time whether he should allow the ship to go free of his claim. The other people had no option. The third system remains, and I think that certainly is equitable as regards the last three. I should mention that Mr. Stranger did not press for the *Squawk's* claim to be postponed, as distinct from the other ships' claims.

The general result of the examination of the cases on priorities leads me to this: that no such rule as contended for by Mr. Carpmael and Mr. Brightman has ever been applied, and I do not think it ought to be applied. I think the origin of the lien and its uncertainty of attachment in some of the cases points to that conclusion. *The Linda Flor* (1) supports that view; because there, although Dr. Lushington gave priority to a claimant for damage by collision over a claim for wages, he specially reserved the case of a bankrupt owner. He says, after deciding that the damage lien took priority of the wages lien in that case: "This is not the case of a bankrupt owner: it will be time to consider such a case when it arises." *The Markland* (2), also, is a useful case to refer to when dealing with these matters; because in that case a suitor had obtained a decree, but payment out had not been made, and the decision was this: "The rule that the Court will give priority to the suitor who first obtains a decree applies only as between claimants in pari conditione. Where, in a suit in rem, a decree has been made per incuriam for the

(1) Swa. 309, 310.

(2) L. R. 3 A. & E. 340.

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payment of money out of the proceeds in Court to satisfy the claim of the plaintiff, the Court may, before the money has been paid, revoke or vary the decree." That case points to the fact that so long as the Court has possession of the proceeds it will see that they are properly distributed. In *The Sea Spray* (1) Bargrave Deane J. postponed a claimant in possession of a maritime lien for damage to the claimant by collision for services of the Thames Conservancy who had raised the ship and incurred expenses in so doing, on the ground that as the res had been preserved through the instrumentality of the Conservators, their claim ranked first, and therefore they would be at liberty to sell the vessel and her cargo, reimbursing themselves for their expenses and costs, in the first instance, out of the proceeds of the cargo, and then out of the proceeds of the vessel, paying the surplus, if any, of proceeds into Court for the benefit of the parties entitled thereto. This decision clearly shows that he did not consider that a damage lien took precedence over all others.

Lastly, in *The Africano* (2), which was a question of rival necessaries men, Sir Francis Jeune P. said: "If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessaries to the date of action brought in respect of it, we should expect to find it held in the less enlightened period before *The Henrich Björn* (3), that funds in Court should be distributed among material men according to the priority of their acts of service. But such was not the view of the judge. . . ." Then he refers to *The Desdemona* (4) and *The William F. Safford* (5), and continues: "It is not, perhaps, easy to understand why Dr. Lushington limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority." That seems to be the effect of all the cases where any priority is given at all. The same view was taken in an Irish case decided in 1869: *The Queen.* (1) On the whole, therefore, I have come to the conclusion that pari passu is the right method of dealing with these different claims.

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(1) [1907] P. 133.
(2) [1894] P. 141, 147.
(3) 11 App. Cas. 270.
(4) Swa. 158.
(5) Lush. 69.

The American cases referred to by Mr. Carpmael were two: *The J. W. Tucker* (2) and *The Frank G. Fowler.* (3) *The J. W. Tucker* (2), tried in a District Court before Judge Brown, was a case of competing liens for towage, where the rule in America seems to be that towage or necessaries, in the same season on the Great Lakes, rank pro rata. In that case the same rule was applied to canal boats on Connecticut River for liens arising in the same season. The judgment refers to *The Frank G. Fowler* (3) as establishing for that circuit the principle that a lien is a vested proprietary interest in the res itself from the time when it accrues; it then proceeds to deal with the various rules of inverse order and pro rata distribution applicable to the ranking of similar and different causes of action, finally deciding in favour of pro rata in the case before the Court. In the Cyclopædia of Law, edited by Mr. William Mack, in vol. xxvi., p. 809, title "Maritime Liens," the author, Mr. Hughes, after referring to *The Frank G. Fowler* (3) and *The John G. Stevens* (4), says: "In view of the nature of the maritime lien as a jus in re, so firmly established by the most recent decisions, the view that the last tort lien is to be preferred seems best sustained by principle." That, apparently, was Mr. Carver's view. In 1897, in *The John G. Stevens* (4), Gray J., delivering the opinion of the Supreme Court from Circuit Court of Appeals, says that this case does not "present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate, in the District Court, giving the preference to the later claim, upon the ground that the interest created in the vessel by the first collision was subject, like all other proprietary interests in her, to the

(1) (1869) 3 M. L. C. 189.
(2) 20 Fed. Rep. 129.
(3) 17 Fed. Rep. 653.
(4) 170 U. S. 113, 120.

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ordinary marine perils, including the second collision; and Blatchford J., in the Circuit Court, reversing the decree, because the vessel libelled had not been benefited, but had been injured by the second collision." That is the effect of the decision in *The Frank G. Fowler*. (1) The statement in the Cyclopædia of American Law is not enough to alter my view after full argument and such consideration of the cases as I have been able to give them.

There is this further consideration. If it be true that all maritime liens for damage attach at the moment of the damage occurring, it follows that when the ship gets into the hands of the Court she has all the several liens attaching to her. One would think that the proper thing to do under these circumstances would be to see that everybody was equally treated. I so decide. The costs of the respective claimants on this motion will be a charge on the fund.

Solicitors for the owners of the *Criterion*: *Thomas Cooper & Co.*

Solicitors for the owners of the *Enable*: *Thomas Cooper & Co., for Ingledew & Co., Newcastle-on-Tyne.*

Solicitor for the master of the *Squawk*: *Arthur C. Kent.*

Solicitors for the owners of the *Roi Leopold*: *Downing, Middleton & Lewis.*

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(1) 8 Fed. Rep. 331; 17 Fed. Rep. 653.

E. C. M. T.

Distinguished. TULIP *v.* TULIP.
[1951] 1 All E.R. 563.

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Oct. 12, 13.

DIVORCE.

DIGGINS *v.* DIGGINS.

Applied. TULIP *v.* TULIP [1951] P. 223

Husband and Wife—Appeal from Justices—Parties living apart under Deed of Separation—Failure of Husband to pay Allowance to Wife—"Wilful neglect to provide reasonable maintenance"—Jurisdiction of Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1.

Sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by s. 1, sub-s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, gives a married woman a right to resort to a court of summary jurisdiction for an order for maintenance in case her husband shall wilfully neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain. The fact that the husband and wife are living apart under the provisions of a deed of separation does not debar the wife from asserting that right where the allowance provided for her maintenance by the deed is unpaid, and the deed itself does not expressly or by implication deprive her of the right or effectually limit it.

Appeal from the justices of Sudbury, Suffolk.

The husband and wife were married on August 17, 1917. There were five children of the marriage. On September 21, 1925, the wife left the husband, alleging that he had been guilty of cruelty. On December 1, 1925, the parties entered into a deed of separation, by which it was agreed that the wife should have the custody of the eldest child, and the husband covenanted to pay to the wife the weekly sum of thirty shillings towards the maintenance of herself and that child. The deed provided that if the husband should be obliged to pay any debt of the wife (other than certain scheduled debts), or if the wife should take proceedings against the husband for restitution of conjugal rights or should at any time directly or indirectly molest him, the weekly sum should cease to be payable. It was further provided that the covenants and provisions in the deed should become void if the parties should be reconciled and return to cohabitation, or if their marriage should be dissolved, or if they should be judicially separated.

The husband paid the weekly allowance to the wife for

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two weeks, and then ceased the payments, alleging that the wife had molested him and that the weekly sum had therefore ceased to be payable. On May 17, 1926, the wife took out a summons under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 (1), as amended by s. 1, sub-s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (2), alleging that the husband had wilfully neglected to provide reasonable maintenance for her and her infant children, whom he was legally liable to maintain.

The summons was heard on June 15, 1926, and objection was taken on behalf of the husband that the justices had no jurisdiction in view of the existence of the deed of separation, which, it was suggested, regulated the rights of the parties. The justices overruled the objection, and found that the wife's complaint was proved.

They ordered that the wife should be no longer bound to cohabit with the husband, that she should have custody of two of the children of the marriage, and that the husband should pay to the wife the sum of twenty shillings a week together with a weekly sum of five shillings for the maintenance of each of the children while under the age of sixteen years.

The husband appealed.

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(1) The Summary Jurisdiction (Married Women) Act, 1895, s. 4, provides: "Any married woman . . . . whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, ... in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act. . . . ."

(2) Sect. 1, sub-s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which came into operation on October 1, 1925, provides: "An application by a married woman for an order or orders under the Summary Jurisdiction (Married Women) Act, 1895, ... on the ground of cruelty or neglect by her husband, may be made notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from him, and accordingly the words 'and shall by such cruelty or neglect have caused her to leave and live separately and apart from him' in s. 4 of that Act are hereby repealed."

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C. E. Jones for the appellant. The justices had no jurisdiction to entertain the summons; the wife was confined to her rights under the deed and her remedy was to sue for the allowance in the county court, where the question of molestation could have been raised and determined.

[He referred to *Piper* v. *Piper* (1); *Roe* v. *Roe.* (2)

THE PRESIDENT. In those cases the question was as to desertion.]

Medway v. *Medway* (3) shows that a summons for neglect to maintain will not lie where the parties are living apart under an agreement for separation.

Melford Stevenson for the respondent. *Medway* v. *Medway* (3) was decided on the ground that the neglect to maintain did not cause the wife to leave and live separate and apart from the husband. The decision has no application since the amendment of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, by s. 1, sub-s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. There is nothing in the deed to preclude the wife from taking proceedings under the statutes, or to show that she has exchanged her statutory rights for her rights under the deed, and therefore the rights co-exist.

[BATESON J. The deed excludes proceedings for restitution of conjugal rights, but is silent as to other proceedings. It contemplates the possibility of proceedings for judicial separation or for dissolution of marriage.]

C. E. Jones in reply. The justices refused to adjudicate upon the deed, or to consider the question of molestation. In the circumstances there was no wilful neglect to provide reasonable maintenance.

THE PRESIDENT (LORD MERRIVALE). The wife in this case proceeded under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, by way of summons before the justices alleging that her husband

(1) [1902] P. 198, 200.
(2) [1916] P. 163.
(3) [1900] P. 141.

had wilfully neglected to provide reasonable maintenance for her. The husband met the wife's allegation of wilful neglect to provide reasonable maintenance by producing a deed into which she had entered, in which there were various mutual covenants. One of the covenants was by the wife against molestation, and the husband said: "My wife has molested me contrary to the terms of this deed, and I claim to be exempt from any liability for her maintenance, because the deed itself provided maintenance subject to a proviso for discontinuance if there were molestation."

It is necessary first of all to see what the Act of Parliament says in its amended form. It is perfectly explicit. It says that if a husband shall be guilty of wilful neglect to provide reasonable maintenance for his wife, a court of summary jurisdiction may make an order for maintenance in her favour. Has the husband neglected to provide reasonable maintenance for his wife? The wife gave evidence of the means of the husband, which puts out of question any contention that the amount of the payment that the justices have ordered could be impeached. She was entitled also to say: "In the deed upon which my husband relies, he has covenanted to pay me thirty shillings a week." So that it cannot be said that the sum which is in question is unreasonable; a reasonable maintenance is not less than the sum which the justices have ordered.

The next question is whether the husband has wilfully neglected to provide reasonable maintenance for his wife. Well, he has purposely neglected. The evidence which the justices accepted was that from the second week after the deed was entered into, the husband did not pay. The husband said that the wife molested him. Counsel for the appellant relies upon the fact that the justices have said: "We cannot go into that matter." The real question is whether the justices were entitled to depart from the terms of the Act, and to incorporate into it a qualification of the wife's right which they might derive by implication from a deed between the parties. The justices thought they were not so entitled.

Apart from the deed, the case is clear. The husband has wilfully neglected to provide reasonable maintenance for the wife. What remains is to ascertain whether the deed excludes the jurisdiction of the justices. It must not be supposed that there is an unlimited right in a wife under the amended statute, wherever she has entered into a deed, at her volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the justices, that she will meet with an answer which will prevent the possibility of further question. If she does not meet with it at first instance, she may meet with it here. But this is not a case of that kind. The case here is that the parties are in disagreement as to their rights under the deed. There are allegations of molestation. There is some evidence of conduct which might be held to amount to molestation. What we have to determine is whether, in these circumstances, the fact that the parties have entered into a deed about maintenance prevents justices from dealing with the matter under the amended Act of Parliament. In my judgment, it does not. The deed here does not exclude the wife from going to the justices if reasonable maintenance is not provided, it does not purport to deal with her rights under the Acts of 1895 and 1925. As my brother pointed out, it does provide against resort to the Courts for restitution of conjugal rights, and it does contemplate the possibility of proceedings for judicial separation. It does not deal with the present form of proceeding.

The true effect of the facts as they stand is this, that the Legislature has given to the wife by the amendment of the law contained in the Act of 1925 a right to resort to a bench of justices for an order for maintenance in case her husband shall wilfully neglect to provide reasonable maintenance for her. This wife has the right, subject only to the proper interpretation of the deed of December 1, 1925. That deed does not either expressly or by implication deprive her of that right, or effectually limit it. The wife's right, therefore, was intact at the time she applied to the justices. She established the necessary facts to bring it into operation, and in my judgment the appeal fails.

BATESON J. I agree. Under the Acts of 1895 and 1925 the wife was and is entitled to proceed in a court of summary jurisdiction for an order for maintenance. It is suggested that the deed is a bar. The deed in terms in the last clause contemplates other proceedings. It excludes one form of proceeding in an earlier clause. It does not exclude these proceedings. I think this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Doyle, Devonshire & Co., for Jones & Son, Colchester.*

Solicitors for respondent: *Peacock & Goddard, for Steed & Steed, Long Melford.*

C. M.

[IN THE COURT OF APPEAL.]

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Dec. 7, 8.

THE CARLGARTH; THE OTARAMA.

Shipping—Manchester Ship Canal—Obstruction—Nuisance—Trap for Invitee—Public navigable Waterway—Manchester Ship Canal Act, 1885 (48 *&* 49 *Vict. c. clxxxviii.*).

While manœuvring to enter Eastham Lock in order to go into the Manchester Ship Canal, the *C.*, the stern tug of the steamship *O.*, grounded on the bank of the dredged entrance channel, constructed and maintained by the Canal Co. under the powers contained in the Manchester Ship Canal Acts, and her propeller picked up a chain (used for mooring dredgers) which was fastened to a "deadman" and lying on the bank.

The President held that the approach to the lock was a public navigable highway; that the chain was an obstruction to navigation; and that the Canal Co. were liable to the owners of the tug:—

Held, that, even assuming the dredged entrance channel was a public navigable highway, it did not follow from the mere fact that the tug's propeller picked up the chain that the chain constituted a nuisance or obstruction to navigation, nor that it constituted a trap if the case was regarded from the point of view (which, in the opinion of Scrutton and Sargant L.JJ., appeared the more correct) that the tug and tow were invitees; that on the evidence the tug could not have picked up the chain unless she grounded on the bank and worked her propeller in the mud; and that in these circumstances the chain did not constitute either a nuisance or obstruction or a trap.

Per Scrutton L.J.: that the right to navigate the dredged channel is confined to vessels paying dues to enter or leave the canal, and that the right of navigation does not include a right to ground on the bank.

Judgment of Lord Merrivale P. reversed.

APPEALS from a judgment of the President in consolidated actions of damage.

The appellants (defendants) in the first action were the Manchester Ship Canal Co.; the respondents (plaintiffs) were Rea Towing Co., Ld., the owners of the steam tug *Carlgarth.* The appellants (plaintiffs) in the second action were the owners of the steamship *Otarama,* whose claim against the Canal Co. had been dismissed.

The facts, which are more fully set out in the judgments of Bankes and Scrutton L.JJ., shortly stated were as follows:—

The *Otarama,* a large vessel 454 feet long, with a tug ahead and astern, was in the dredged entrance channel approaching the locks at Eastham intending to enter the ship canal on the night tide, when the propeller of the stern tug, the *Carlgarth,* picked up a chain, and both the *Otarama* and the *Carlgarth* sustained damage for which they sought to make the Canal Co. liable.

The learned President negatived the plaintiffs' case that the tug's propeller had picked up in the channel a mooring chain attached to a small unlighted buoy and that the tug in consequence had gone ashore and dragged the *Otarama* ashore also; but he found that in manœuvring to straighten the *Otarama* going into the lock the tug had got on to the bank, and in working her propeller in the mud to get herself off had picked up a chain (used for mooring dredgers) which was fastened to a "deadman" and lying on the bank. He held that the *Otarama* got ashore owing to the negligence of the *Carlgarth,* but that her negligence was only towards the *Otarama* and not towards the Canal Co.; that the approach to Eastham Locks, to the limit of the flow of the tides, was a public navigable waterway and that the tug had the right of navigation in the water at a proper level upon the bank; that in navigating upon the bank she came by some error in the performance of her duties as a tug into a position in which she touched the ground, but that that was in breach of no obligation to the defendants.

His Lordship accordingly held: (i.) that, as the *Otarama* was put ashore owing to inefficient towage by the *Carlgarth* and not by reason of the propeller of the *Carlgarth* being foul of the chain, the action by the owners of the *Otarama* against the Canal Co. failed; but (ii.) that the damage to the *Carlgarth* was due to " the defendants' chain, placed upon a bank in a public navigable river without general or particular notice to those whom it concerned," and that accordingly the claim of the owners of the *Carlgarth* succeeded.

The Canal Co. and the owners of the *Otarama* appealed.

Sir John Simon K.C., *Dunlop K.C.*, *Langton K.C.* and *G. St. C. Pilcher* for the appellants, the Manchester Ship Canal Co. Vessels entering the canal have to pay dues, and the President was wrong in holding that this entrance channel is part of a public navigable waterway; the Canal Co., as the plaintiffs themselves plead, constructed and maintain the canal, entrance channels, and approaches, under the powers conferred by the Manchester Ship Canal Act, 1885, as amended and varied by the subsequent Canal Acts (see in particular ss. 28 and 29 of the main Act); and they have the right and the duty to dredge and to place the necessary moorings. It is not suggested that the company would not be liable if they left a chain in such a position that it constituted a trap for invitees lawfully navigating the waterway, but to pick up this chain at all the tug had not only to be on the bank but to scour a hole there some 2½ feet deep. If vessels bump into the bank, where they ought not to be, they do so at their own risk; it could not seriously be contended that if the bank had been composed of hard material instead of mud and the tug had broken her propeller, the Canal Co. would be liable.

[They were stopped.]

Schiller K.C., *D. Stephens K.C.* and *E. Stewart-Brown* for the respondents, the owners of the *Carlgarth*. The chain lying on the bank in such a position that it was liable to be picked up by a vessel's propeller was either a nuisance on a public navigable highway or a trap for an invitee; and the fact that the tide ebbs and flows over the bank where the accident happened affords strong prima facie evidence that it is a public waterway: *Miles* v. *Rose*. (1) The President found that "there was no distinct evidence that there was not, long ago, a navigable waterway up a creek where the entrance to the Eastham Locks now is," and the fact that the present entrance was constructed and is maintained under the Canal Co.'s Acts is immaterial; the public right of way would follow the river to its new course: *Rex* v. *Montague*. (2) Further, the public have the right to navigate over every part of the waterway: *Williams* v. *Wilcox*. (3)

[SCRUTTON L.J. They have no right negligently to take the ground and excavate a hole.]

There was no breach of any obligation to the defendants in taking the ground; the President negatived negligence qua the defendants and held that the tug touched the ground as the result of an error in the performance of her duty to the *Otarama*. It was not improper for her in these circumstances to work her propeller in the mud in trying to get off the bank, and once it is established that the propeller picked up the chain it is for the Canal Co. to show that it was not an obstruction and a nuisance or a trap for an invitee: see *Indermaur* v. *Dames* (4); *Clark* v. *Chambers*. (5)

[SCRUTTON L.J. referred to the oyster bed cases: *Colchester Corporation* v. *Brooke* (6); *The Octavia Stella* (7); and *The Swift*. (8)]

In *The Swift* (8) there was negligence; here the tug got on the bank "in the ordinary course of navigation," as in the *Colchester* case. (6) But even supposing the tug had no

(1) (1814) 5 Taunt. 705.
(2) (1825) 4 B. & C. 598, 604.
(3) (1838) 8 Ad. & E. 314.
(4) (1867) L. R. 2 C. P. 311.
(5) (1878) 3 Q. B. D. 327.
(6) (1845) 7 Q. B. 339.
(7) (1887) 6 Asp. M. L. C. 182.
(8) [1901] P. 168.

right to ground and excavate a hole the defendants had no right to set a trap even for a trespasser. The appellants' argument that it could not be suggested that, if the bank had been composed of hard material, the tug could not have complained if she had damaged her propeller against it, is beside the point, for a hard bank would be marked on the plans and would not constitute a trap. The defendants' Acts of Parliament do not provide that these moorings shall be placed in specified positions, and if an Act authorizes the doing of things which can be done without creating a nuisance they must be so done: *Vaughan* v. *Taff Vale Ry. Co.* (1)

W. N. Raeburn K.C. and *Balloch* for the appellants, the owners of the *Otarama*, admitted that if the Court was of opinion that the appeal of the Canal Co. against the owners of the *Carlgarth* should be allowed, the *Otarama's* appeal must fail.

[No reply was called for.]

BANKES L.J. These are two appeals from a judgment of the President in a consolidated action in which the owners of two vessels, the *Otarama* and the tug *Carlgarth*, sought to recover damages against the Manchester Ship Canal Co. Both plaintiffs claimed damages upon the ground that their vessel had been injured owing to a default on the part of the Canal Co. which had occurred not far from the entrance to the Eastham 80 foot Lock, which gives access to the ship canal from the Mersey. The lock is approached by a dredged channel, and speaking of the two sides of the channel as if they were east and west, on the easterly side of the channel there are thirteen fixed dolphins, and on the westerly side there are, towards the entrance of the channel, three dolphins only. In the space between the last of those dolphins and the entrance to the lock there have been, for the last thirty years apparently, a number of mooring chains attached to the shore and leading down to the bank, but not reaching what is shown on the plans as the dredged channel. There are seven of those mooring chains extending to within a short distance from the last of the dolphins, No. 16, close up to the entrance of the lock itself. The chains were put there for the convenience of mooring the dredging barges employed in the constant dredging operations which have to be carried out in order to keep this channel clear. Dredging can only take place during certain states of the tide, and it is very material, therefore, that those mooring chains should be available.

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(1) (1860) 5 H. & N. 679.

The mishap—to use a neutral expression—took place on the night of November 15, 1925. Up to the previous September the seaward ends of the mooring chains had been attached to small wooden buoys called piggy buoys; each chain had its buoy and to each chain and buoy there was attached a wire—called a preventer wire—for the purpose of keeping the buoy in position. Whether those buoys were there for the purpose of marking the position of the chains, or for the convenience of the barges picking up the chain, we are not told. But there is this fact with regard to them, those buoys were never lighted, and it is obvious, therefore, that they were not regarded by anybody as a source of danger to vessels coming into or out of the lock. The reason for the removal of the buoys was that for the time, at any rate, the dredging of the mud had ceased, and the Canal Co. were using a rock dredger, for which it was necessary to have a permanent mooring chain right across the channel from one of the dolphins attached to the west bank. After the piggy buoys were removed the chains necessarily rested on the bank, and it is in respect of one of those chains that the plaintiffs complain.

The case made for the tug—and in this appeal the really important point—is whether the *Carlgarth* succeeded in establishing her claim. Her case was very plainly, and, from the lawyer's point of view, very completely, set out in the statement of claim. The cause of action was put in four different ways; but each cause of action rested upon the assertion that the piggy buoy was in position, and that the mooring chain was attached to the piggy buoy. There was no allegation about the preventer wire in the statement of claim, that came later. The allegation in para. 5 of the statement of claim is based upon an alleged breach of statutory duty. It is there alleged that although it was the duty of the Canal Co. to keep the entrance in a safe and proper condition the defendants allowed it to be in an unsafe and dangerous condition by placing, or keeping, or allowing to be placed or kept, a small unlighted buoy attached to a mooring chain, so that the propeller of the *Carlgarth* became entangled with the buoy. In the next paragraph, by an alternative cause of action, it is alleged there was a breach of common law duty in that the defendants invited the tug to come to this position and that the buoy was in the nature of a trap. The third alternative cause of action was that the defendants were guilty of negligence in allowing the buoy and the mooring chain to remain in that condition, and in that place; and fourthly, there is an allegation that there was a breach of common law duty, because the buoy and the mooring chain constituted a nuisance and an obstruction in a public highway. When particulars were asked for they were given, and the additional fact was stated that what was complained of was not only the buoy and the mooring chain, but the preventer wire, which was attached to the mooring chain.

That was the case, and a large amount of evidence was given in support of it, and on the other side in attempting to rebut it—and I think that this is an instance of how sometimes an important point is lost sight of when the parties are allowed to depart from their pleaded case and set up at the last moment some alternative and different case to which the attention neither of the witnesses nor of the judge during a long time has been directed. That appears to me to have been the result of trying this case in the way in which it in fact was tried. The plaintiffs called evidence in support of their case as pleaded, and their principal surveyor was very emphatic that it was an essential part of the plaintiffs' case that the mooring chain must have been attached to the buoy, and that he could not conceive the fouling of the chain by the propeller if in fact the chain was lying upon the surface of the bank. It is not only the pleaded case, therefore, but it is a case that is supported in a most emphatic way by the witness who is called, and whose evidence is mainly relied upon as establishing the suggestion put forward as to how this mishap occurred. On the other hand, a witness was called for the defendants, and, of course, it was the defendants' object in answering the case as formulated by the pleading and supported by evidence to show that it was possible, or might be possible, for the propeller to pick up the chain, although it was lying on the surface. For that purpose a surveyor was called, and I think that under the circumstances one may say that he did his best, but he failed to convince anybody that it was possible to pick up the chain if it was lying on the surface of the bank. He failed to satisfy the President, and it is quite plain that it is an impossibility if this vessel was upon anything approaching an even keel, for her, constructed as she was, to pick up this chain if it was lying on the surface—and there was nothing there but the chain. When, therefore, the whole of the evidence was closed counsel for the plaintiffs realized that the defendants had met his case on the facts in a way which made it very improbable that the Court would take any other view than that these buoys had been removed some months before the mishap; and he anticipated, therefore, as complete a wreck of his case as unfortunately happened in the case of this unfortunate tug herself. He therefore changed his ground and he presented an alternative founded, as he suggested, upon the defendants' own evidence. As to that, where there is a pleaded case and evidence has been given for the plaintiffs in support of it and evidence of the defendants against it, no doubt it is perfectly legitimate and proper for counsel for the plaintiffs to say: "Well, it so happens that the defendants have given evidence in support of my pleaded case which is so strong that I will jettison my own evidence and I will rely on theirs in support of my pleaded case." But that could not be done here. What had to be done was to jettison the pleaded case and to rely on the defendants' evidence to support an entirely new case.

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The alternative case was this: "Assume the plaintiffs are wrong about the buoy and the mooring chain attached to the buoy and the preventer chain not being there, and assume that the defendants are right in saying that the buoy had been removed and the chain was lying upon the bank, yet in that position, in a way the plaintiffs cannot explain and do not attempt to explain, somehow it did get foul of the tug's propeller, and that fact by itself is sufficient to prove a case of a nuisance in a navigable highway; the plaintiffs need not say anything more than this: that their tug was lawfully where she was in fact; and that, somehow, her propeller fouled a chain which was on the public highway; it had been placed and maintained there by the Manchester Ship Canal Co., and that is enough for the plaintiffs, and entitles them to a judgment." It seems to me, reading the learned President's judgment, that that was the way in which the case was really presented to him, and that that was all he directed his mind to; and perhaps that is natural in considering the number of points which had been taken in fighting the pleaded case and having regard to the fact that this alternative case was only launched in speeches of counsel. I will refer to the President's judgment on that point. He says: "There being that issue very definitely raised in the case, counsel yesterday claimed on the footing that the chain which is in question and which fouled the propeller of the *Carlgarth* was lying on the bank in the position in which the defendants asserted that it lay, and was there without any right of the defendants to have it there; that it was an obstruction to navigation; and that if the chain in that position without negligence in that particular on the part of those navigating the *Carlgarth* became foul of the propeller, there was—by reason of the right of His Majesty's subjects and of all persons to navigate upon the navigable waters of the realm and in the navigable tidal rivers—a right on the part of the owners of the *Carlgarth* in the first instance, and of the owners of the *Otarama* in the second instance, to recover in respect of damages caused to them by the fouling of the propeller of the *Carlgarth* by that chain."

With great submission to the learned judge, the way in which the case was put to him was not sound in law. Whether, as ultimately submitted, the case was either that of a nuisance in a public navigable highway or of a trap set before an invitee, it seems to me the question resolves itself into a question of fact which requires the minutest consideration of the evidence upon which it is contended that the particular thing complained of is either an obstruction or nuisance, or alternatively, a trap. That the question is one of fact is shown by *Reg.* v. *Betts* (1), and it is, I think, useful to remember that in order to establish nuisance or obstruction in a public highway something which is indictable—a punishable offence—must be established. One must consider, therefore, the various suggestions which have been made as to the picking up of this chain : one must consider whether upon the evidence the reasonable conclusion is that the chain was picked up without any extraneous assistance. [His Lordship analysed the evidence and dealt with the various suggestions which had been made and negatived as to the way in which the chain had been picked up, and continued :] Accordingly, all the suggested ways in which this chain could have been fouled by extraneous assistance of a wire disappear, and all one has to deal with is the single mooring chain lying flat upon the surface of the bank.

The question is, therefore, with regard to such a mooring chain, is it a nuisance ? Is there any evidence on which any reasonable jury could find it was a nuisance or a trap ? With great respect to the learned President, he does not seem to me to have directed his mind to that point, and I can understand why he did not do so, because all his attention was directed to points on which the real fight took place, and to which the whole of the evidence was directed. It now transpires that the only case the plaintiffs can make assumes the absence of the buoy, and when one comes to that one has to consider the whole of the evidence on the footing that one is dealing with a mooring chain lying on the ground, and nothing else. When the buoy was taken away the chain became something which, on the plaintiffs' own case, persisted in up to this moment, a vessel on anything like an even keel, and built as this tug was, could not pick up. It is said, "Res ipsa loquitur—there it was—and the propeller did pick it up." Yes, but how came it to pick it up? When one has eliminated all the extraneous causes in connection with the wire or its being somehow raised above the surface by other chains, what has one got left? One is left with the chain which, if lying flat on the surface and not interfered with, cannot foul the propeller of a vessel as it fouled it on this occasion. Further, there was a hole in close proximity to the spot where the propeller of the tug must have been. It is only natural to suppose that the tug, in the position in which she was, and going full speed ahead at the time she did, would churn up the mud with her propeller, and make some sort of a depression—everybody on the part of the plaintiffs objects to the word "hole." It seems to me to render it conceivably possible that the chain, being where it was, and this churning up taking place, as and when it did, the fouling might have become possible on the assumption that the chain was wound from the seaward end. That seems to me the only possible explanation as to how it took place when one has eliminated all the other suggestions; and that is the view which the President himself took. It is the chain plus the hole, therefore—if you choose to call it a hole—that in the President's view rendered it possible for the chain to become fouled.

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(1) (1850) 16 Q. B. 1022.

If that is the true position, is it possible for anybody, considering the facts as a whole and from the beginning, to say that any jury would have found that this chain was an obstruction? One starts with this: it is a statutory obstruction in this sense; it exists in the area in which the Manchester Ship Canal Co. have the statutory right to place moorings; secondly, it is approved, apparently, by the Conservancy Authorities; thirdly, it has been there, either in the dangerous form attached to a buoy or in the safe condition in which it was lying on the bank, for thirty years, and in a place where from the absence of dolphins I should judge it is thought likely that tugs may have to go in certain states of the tide in order to assist vessels in or out of this lock. Taking all these things into consideration, and bearing in mind that this chain only became dangerous under the very special and exceptional circumstances brought about by the tug herself, I am unable to come to the conclusion either that the chain was a nuisance or an obstruction in a public navigable highway, or a trap set for the unwary invitee. That is the ground upon which I desire to base my judgment. I purposely avoid dealing with some matters which may be of importance and with regard to which possibly a great deal might be said. One is whether this dredged channel is part of the navigable channel so that it could be said to be a public highway; another is whether in doing what she did, making this hole and scouring away the mud, the tug was pursuing a lawful operation, or whether she was negligent in getting where she did.

The point of view I take is that the plaintiffs entirely fail to prove either the case which they set out to prove, or the alternative case which was launched at the last moment, and does not seem to me to have received the attention which the particular point ultimately raised deserves. I think for these reasons the appeal of the Canal Co. succeeds. It follows that the appeal of the owners of the *Otarama* in their action against the Canal Co. fails and must be dismissed.

SCRUTTON L.J. I have come to the same conclusion as my Lord. As we are differing from the President in a case which has taken rather a curious course, and as it is intimated that it may go further, I will state shortly the grounds on which I have come to my conclusion.

At midnight on November 15, a large vessel, the *Otarama*, of 7753 tons gross, was leaving the estuary of the Mersey and entering Eastham Lock in order to go into the Manchester Ship Canal. She had a tug forward whose movements are immaterial and a tug aft whose movements are very material. In the course of entering Eastham Lock the *Otarama* came astern towards the starboard side of the channel and hit the lock wall; she did damage to her engines, and her stern tug grounded and, when the tide ebbed, fell over and is said to have become a wreck. Whereupon the owners of the *Otarama* and the owners of the tug agreed that they would sue the Manchester Ship Canal Co. The case which they set out to prove was that the ship and tug were in the navigable channel, and that, floating in the navigable channel, they found an unlighted buoy with a wire attached to it; that that wire was attached to a mooring chain, and that the stern tug caught her propeller in the wire, proceeded to wind it up, or get fast in some way to the chain, and, the chain being fast at the land end, pulled herself back and pulled herself ashore by hauling on to the chain, whereby she was pulled out of the navigable channel on to the ground of the bank on the starboard side, with the result that she also pulled the ship ashore; and that this disaster to the tug and the ship was due to the fact that the Manchester Ship Canal Co. had left in the navigable channel this unlighted buoy with wire attached to it so that a ship navigating in the ordinary course of events fouled the wire, and then fouled the chain. That was the case that the tug and the ship set out to make, and proceeded to endeavour to make for five days without any reference to any other case. But, unfortunately, there was one fact which, if established, spoilt the whole of that case, and that was that there was not any buoy nor any wire in the navigable channel, and if that were proved the whole theory that a blameless ship and tug proceeding along caught an obstruction and were fouled, fell, and it would follow that if they got out of the navigable channel they did not get there because of any obstruction placed there by the defendants. If the President believed the witness who said that he ordered the buoy to be removed and the witness who said that he removed it and put it aboard ship, the plaintiffs would have to cast about for some other case, and so, on the sixth day, the other case was presented. "Assume we are wrong," said the plaintiffs, "as to there being an obstruction in the navigable channel, there was an obstruction, or nuisance, in the shape of a chain on the bank bordering the navigable channel, and that, we will say, was an obstruction to the public right of navigation, and you, the Canal Company, put it there, and therefore we say you have caused us damage for which you are liable." The President, having devoted the greater part of his judgment to negativing sedulously every contention put forward by the plaintiffs, at the end of his judgment adopted this alternative suggestion and said that the chain was an obstruction on a bank in a public navigable river without notice to those whom it concerned, and, therefore, gave judgment for the tug.

To ascertain whether that is a correct view, the first point seems to me to be to understand where it is that this obstruction is said to have been and what are the rights of the respective parties, and I personally have been much puzzled by the fact that apparently counsel got through this case in about six days without ever referring to the Manchester Ship Canal Acts. The President makes no reference to the main Act of 1885; he only says that there is some evidence that a later Act empowered the Canal Co. to deepen the channel; but there is no other trace in the course of the judgment or in the evidence that anybody ever referred to the main Act, or to the powers, rights, and duties of ships on the canal. They seem to me to be vital. I am not going to discuss the interesting question, because I think it is immaterial, whether this place was in the Port of Liverpool or in the Port of Manchester. Undoubtedly in the earlier Act the Port of Liverpool went up to Warrington in the estuary of the River Mersey. Undoubtedly in the later Act a portion of the Port of Liverpool was taken away and put into the Port of Manchester. No evidence was given which will enable me to say—the point did not occur to anybody and it is not material—how much of the Port of Liverpool was taken away and put into the Port of Manchester, but I rather think that the place where this collision occurred was not put into the Port of Manchester. It does not matter whether it was or was not, what does matter is that it is clear that the place where the chain was is on the bank of an artificially dredged channel constructed by the Manchester Ship Canal Co. under the powers given to them in s. 29 of the main Act. It is equally clear from the incorporation of the Harbours, Docks and Piers Clauses Act, 1847, and from s. 33 of that Act that any ship paying the Manchester Ship Canal dues has the right to navigate that artificially dredged channel. I very much doubt whether any other ship has any right to use it unless she is going into the Manchester Ship Canal; I do not think people can make private yachting excursions up and down this dredged channel without running the risk of being moved away by the harbour master under the powers conferred by s. 58 of the 1847 Act. Any vessel grounding in that artificial channel at low water would find herself moved away as having no right to be there. I am not at all convinced there is any public right of navigation, in the sense of the right to anybody sailing in the estuary of the Mersey, to use that artificially dredged channel unless they are proceeding into the ship canal and pay the dues for the canal. In any event the public right of navigation does not usually include any right to ground. I cannot help thinking that if this question of the public right of navigation had emerged at an earlier stage of the proceedings, and more consideration had been given to it, it would have been seen that the right does not ordinarily include any right to ground on the bottom of the navigable river.

Some confusion arises from applying cases relating to highways on land, to the navigation on water. In a highway on land, if the land is founderous, there is a common law right to go on to adjoining land and make one's way there. In a highway of water there is no right, unless a special custom is proved, to land on the riparian area of the owner's land. Another distinction is that in a highway by land one proceeds by physical contact, but in water one proceeds by floating along in the water, and it is only in special circumstances that there is any right to ground or sit on the bottom of a river, just as there is no right to sit in the middle of a road and say one is exercising a right to use a public roadway. All the authority, as far as I know, is collected on that subject in *Colchester Corporation* v. *Brooke* (1), where the vessel proceeded to Colchester and sat upon an oyster bed; and the owner of the oysters, not unnaturally, complained. It was proved that in the ordinary course of navigation to Colchester one could not get up from the sea to Colchester in one tide, and consequently that the ordinary way for inward bound vessels was to go as far as they could on one tide, then ground and proceed on when the tide rose again. That is a right of grounding only when special facts of that sort are proved to show that it is the ordinary course of navigation for vessels to ground. It is not the ordinary course of navigation in the Manchester Ship Canal to ground anywhere—vessels get in on one tide; there is no need for them to ground. If a ship ran into the bank and knocked a bit out of it, there would be a clear case of trespass on the land and the rights of the riparian owner. If the ship runs into the foreshore and knocks a bit out of it—particularly in a case where there is a navigable dredged channel and where knocking a bit out increases the necessity for dredging the channel—it is not an incident in the ordinary right of navigation. That sort of point arose in the *Colchester* case (1), and also has been decided both in *The Octavia Stella* (2) and in *The Swift.* (3) In the latter case Sir Francis Jeune dealt with an accidental grounding. He said: "The master of the *Swift* never intended that she should ground. How far he was negligent may be another matter; but it is clear that this act cannot be justified as an exercise of the ordinary rights of navigation." What then have we got? We have got a tug doing a thing which was not justified by the ordinary rights of navigation in a place which, in my view, only vessels about to enter or leave the Manchester Ship Canal may navigate, and navigate in the ordinary way by floating, and not by running into the bank. What then is the position? If I am correct in the view I have taken that the tug had no right to ground and was not doing a thing in the ordinary

(1) 7 Q. B. 339.

(2) 6 Asp. M. L. C. 182.

(3) [1901] P. 168, 174.

course of navigation, in grounding and knocking away part of the bank of the foreshore she was a trespasser. If she was not a trespasser, she was an invitee. I will consider both cases.

Mr. Schiller argued that the tug was a trespasser, that there was a trap, and that traps must not be set for a trespasser. That suggestion has been somewhat ridiculed by one of the text-book writers who asks whether in the case of a burglary the burglar can bring an action against the owner of a house because there is a trap on the staircase, which is unsafe for him walking up it. I think it is clear, as was stated by Sir John Simon, that the general principle is that he who enters wrongly, enters at his own risk. The only exception is that the statutes have provided that man-traps or spring guns must not be set for trespassers. But that you may set traps for trespassers is obvious. Many people put broken glass along the top of their walls, or put up barbed wire fences which prove very inconvenient for a trespasser entering by night, who may cut himself on the glass or catch himself on the barbed wire; but it is clear that the trespasser has no right to complain of that, because it is an act which the person has a right to do in the defence of his property, an act not forbidden by the statutes which prevent the setting of man-traps or the setting of spring guns. But when one inquires what sort of trap this is, it seems to me to be an object which the Canal Co. had a right to put there. There is no doubt that under ss. 28 and 29 of the main Act the Canal Co. have a right to dredge the bed of the Mersey to make an access to the canal at Eastham from a point which lies below, and therefore includes, the place where this dredging was done, and in order to construct these works and works incidental thereto—which include the work for dredging the channel—they have a right to put dolphins, moorings, and buoys; and if moorings are reasonably necessary for dredging of the character which has to be done here, it appears to me that a mooring on the bank of the channel is a most ordinary and reasonable thing to provide, and one which they have a right to put upon the bank. It may be said that if they have put it there, they must give notice of it. As to that, I am a little puzzled by the President's finding. Here is a perfectly plain "deadman," one of a series of "deadmen" standing in broad daylight along the bank, and attached to them are an equal number of chains leading down into the water; and the President finds that pilots and tugmasters know that mooring chains are there. It is true that he does not find that they know exactly where each mooring chain is in the dark; but he finds that they know that mooring chains are there, and if, as I think, those are obviously justified under the powers contained in the Manchester Ship Canal Act, I find it impossible to see how an obvious chain put on a bank upon which the ship has no right to ground, can possibly be a trap about which the trespasser (if it be a trespass) can complain.

The other way in which the case is put is that having paid dues, the tug and the ship are invitees. But invitees to do what?—invitees to float through the lock in the ordinary course of navigation—not invitees to run into the bank and dig pieces out of it—not invitees to proceed by groping along the bank, regardless of chains legitimately put there for dredging. When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way in which it is used. In the same way if a person is invited to use a navigable channel it appears to me he is invited to use it in the ordinary way of navigation by floating along it, and not to back into the artificial sides of the navigable channel and make holes with his propeller, and then complain because in making a hole he finds something.

For these reasons, I think that the President, having spent the greater part of his judgment in negativing the case which for five days had been set up for the plaintiffs, made too sudden a jump in finding the defendants liable on the ground of interference with the navigable right. He had not the advantage of considering the points that would arise if the case was put on the ground of nuisance. What the President says is this: "That is the material question in this case, as I regard it, between the *Carlgarth* and the defendants: was there negligence in respect of the fouling of the propeller —the picking up of the chain—which would amount to contributory negligence so as to disentitle the owners of the *Carlgarth* if otherwise they are entitled to recover?" It appears to me before the President got to that stage, he should have considered other questions: (1.) Had the *Carlgarth* the right to be where she was and doing what she was doing—keeping her propeller turning on the bank; (2.) Was the chain a thing which the Manchester Ship Canal Co. had the right to have there upon their foreshore, under their Acts; (3.) Was it a thing which might probably do damage to vessels exercising the proper right of navigation? I think if the President's mind had been directed to those questions, and he had dealt with them before getting to any question of contributory negligence, he would have found that the tug and ship—the tug particularly—was either a trespasser, in which case she would have no right to complain of what she found lawfully placed on the bank where she was trespassing, or that she was an invitee, but not an invitee who had been invited to go on to the bank.

I shall add very little to what my Lord has said about this wire and chain. I am afraid prolonged experience of these Courts has accustomed me to finding the thing has happened which the witnesses upon each side declared to be quite impossible. There is no doubt the chain did get round the propeller, and I think there is no doubt, on the findings of the President, that it did not get there because the tug had fouled a wire attached to a buoy. I have great difficulty, as I think the President had and as our assessors had, in understanding exactly how the accident happened; but if a tug is allowed to work on a soft bank where there is a chain, and afterwards a 2 feet 6 inches hole is found and the chain is found on the propeller, I do not know that it is necessary for me to understand how it gets there.

For these reasons, thinking the case was unsatisfactorily tried because of this sudden change of front on the part of the plaintiffs, who had been beaten on their pleaded case, and

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thinking also that it was not very satisfactorily tried because of the singular reticence of each side in referring to the magna carta of the Manchester Ship Canal Co., the Act which gives them their powers, I have come to the conclusion that the President came to a wrong conclusion, and that the appeal of the defendants should be allowed.

SARGANT L.J. I am of the same opinion. We are not differing here from the President on any finding of his with regard to the particular facts and theories in regard to this case; we are accepting his view that the only possible default of the defendants lay in leaving this mooring chain lying on the surface of the ground of the waterway. We are only differing from him as to the question of the legal result as between the parties arising from the fact that the Canal Co. left this mooring chain in the position in which it was left. The President has taken the view that this was a public navigable highway, and as far as I can see a public navigable highway in the same sense as the ordinary waters of the Mersey constitute a public navigable highway. For myself, I am inclined to think that that is not quite the position; this was an artificial channel constructed and dredged for the special purposes of the Manchester Ship Canal navigation, and I think that the question is one rather of whether there is a trap in the artificial waterway so constructed and maintained, of which an invitee using the artificial waterway can complain, than whether it constitutes a nuisance in an ordinary public highway. But in any case, the question seems to be eminently a question of fact.

Now the attention of the President does not appear to have been called to the question of fact which, on his view of the case, had to be determined—namely, whether this chain did in fact constitute a nuisance in an ordinary navigable highway. Still less was his attention called to the question whether this was a trap of which an ordinary invitee to the canal was entitled to complain; and, in that state of things, we have to form our own judgment as well as we can as to whether the facts indicate that this was either a nuisance or a trap.

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It seems to me of great importance to bear in mind that this was a highway for the purposes of the Canal Co , artificially constructed and artificially maintained by a necessary process of extensive and almost continuous dredging; and it has not been shown that the plan adopted by the Canal Co. of keeping these chains in the water ready to be used by the dredgers in the comparatively short intervals during which they were able to dredge, having regard to the use of the canal by the vessels navigating it, was in any way an improper process for them to adopt. The chains and the attachment of the chains to the land were obvious to persons coming for the purpose of using the canal, and the chains lying on the surface of the ground under the waterway do not seem to me to present the ordinary characteristics of an obstruction. Further, the evidence was quite clear that it was impossible for the propeller of a tug such as this to foul that chain in any ordinary circumstances; the only way in which, apart from the suggested method which was negatived, it was suggested the fouling could take place was through the digging by the propeller of a hole in the bank, such a hole being in fact found after the accident, and the possibility that if the chain lay almost parallel with the vessel it might be caught by the propeller and worked round the boss in the way that happened. Therefore what has happened must, I think, have been the result of a very exceptional set of circumstances, and one which could hardly have been foreseen by any human being.

There is also this further circumstance that during the thirty years in which the channel has been used there appears to have been no incident of this kind that is known to have occurred. It was suggested that we have not to consider the thirty years, we have only to consider about a month, because the special circumstances which were in existence at the time of the accident had only existed for about a month. But, on the very showing of the plaintiffs, the circumstances that had existed during the previous twenty-nine years and eleven months had been much more dangerous than those which existed during that month, because the whole case of the

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plaintiffs was based upon the special danger which arose from the way in which these moorings were fixed, as they thought, and as their case was, at the time when the accident happened. Therefore, looking at it from the point of view of a jury, and having regard to the fact that it is essentially a question for the jury, according to the case to which my Lord has referred, I myself have come to the conclusion that the leaving of such a chain as this in a highway of the kind in question was not, within any reasonable interpretation of the ordinary meaning of the English language, a nuisance or a trap. I agree therefore that the appeal of the Canal Co. against the *Carlgarth* should be allowed, and the appeal of the owners of the *Otarama* against the Canal Co. should be dismissed.

Appeal of the Manchester Ship Canal Co. allowed.
Appeal of the owners of the Otarama dismissed.

Solicitors for the appellants, the Manchester Ship Canal Co.: *Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents, the owners of the tug *Carlgarth*: *Weightman, Pedder & Co., Liverpool.*

Solicitors for the appellants, the owners of the steamship *Otarama*: *Batesons & Co., Liverpool.*

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THE VALSESIA.

Shipping—Salvage—Agreement to beach disabled Ship for a Lump Sum—Negligence—Implied Obligations on Part of Ship.

The masters of the plaintiffs' tugs hailed the defendants' ship, which had grounded on rocks and received damage, and, for 300*l.* and 150*l.* respectively, agreed to beach her. In the course of the operation the servants of the defendant shipowners on board the ship negligently failed to slip their cable, with the result that the ship grounded again in no better position than she was when the tugs took hold of her :—

Held, (i.) that as the plaintiffs had not completed the work they contracted to perform they were not entitled to recover the sum stipulated for under the agreement ; but (ii.), that in such an agreement there was an implied obligation on the part of those in charge of the ship to use ordinary care and skill in carrying out their part of the work ; (iii.) that as the defendant shipowners by their negligence had deprived the plaintiffs of the opportunity of earning the stipulated sums the plaintiffs were entitled to damages ; (iv.), that as in substance the tugs had completed the whole of what they had to do the damages were the sums of 300*l.* and 150*l.* respectively ; and (v.), that as the defendant shipowners had appeared to the writ in rem the plaintiffs were entitled to a judgment in personam against them for these amounts.

ACTION OF SALVAGE.

The plaintiffs, the owners, masters and crews of the steam tugs *Bantam Cock* and *Prairie Flower*, claimed 300*l.* and 150*l.* respectively under an agreement to render services to the Italian steamship *Valsesia*, her cargo and freight in Barry Roads on August 25 and 26, 1926. Alternatively, the plaintiffs claimed salvage. The defendants denied that the plaintiffs were entitled to the named or any sums as reward for salvage services, and alleged that the tugs were unable to keep the *Valsesia* clear of rocks on which she grounded and broke her back.

In the course of the hearing the plaintiffs were allowed to amend their statement of claim by alleging that if (which they denied) the contract was to beach the *Valsesia* under the direction of her pilot, the plaintiffs were prevented from carrying out the obligation by reason of those on board the

Valsesia negligently failing to slip or cut their cable in due time.

The facts are sufficiently set out in the judgment.

A. Neilson K.C. and *G. H. Main Thompson* for the plaintiffs.

Langton K.C. and *Lewis Noad* for the defendants.

[It was contended on behalf of the defendants that in salvage the plaintiffs are volunteers and those on the salved ship owe them no duty; that under the salvage agreement to beach the ship the ordinary principles applicable to a salvage service applied except that the amount of salvage had been fixed in advance in the event of success, and that if the plaintiffs did not succeed they would not be entitled to the agreed sum; that they could, however, abandon the operation if they chose; and that conversely those on the ship were under no obligation to the tugs, and were not liable even if, as alleged, the plaintiffs were prevented from successfully carrying out the work by reason of the defendants' negligence.]

HILL J. This case raises several curious points. I have not any doubt as to the facts, the only doubt is as to the law; but in my opinion the law does give the plaintiffs the right which in fairness they ought to have. Their claim is brought against the owners of the steamship *Valsesia* and her cargo in respect of services rendered on August 25 and 26, 1926, under a contract. The defendants do not deny the contract, or that the sums payable to the plaintiff tugs were the amounts pleaded, but they contend that the condition was different to that alleged by the plaintiffs. The plaintiffs' case is that they were employed to render such services as they performed, and, in substance, to do their best; the defendants' case is that the condition was that the tugs should beach the vessel.

The circumstances in which the services were rendered were as follows: The *Valsesia* on the morning of August 25 was approaching Barry with a cargo of 7690 tons of coal when she found herself close to the rocks at Friar's Point. She thereupon dropped her starboard anchor, but grounded on the rocks. During the succeeding ebb tide, while the vessel was in very great danger, she was got off the rocks, but received severe damage. On the flood she floated, and in the evening, on the same flood tide, the two tugs in question were engaged to render her assistance. It is common ground that—whether expressed or not—what was contemplated was that they should assist in getting the *Valsesia* on to the beach in Whitmore Bay, a sandy bay which lies very close to Friar's Point and between it and Nell's Point on the other side of the bay. That operation was not effected, and in the result, after some hours' work, the *Valsesia*, after the tide had turned, grounded again on the same rocks, very nearly in the original position. Thus she had not been beached and she was in no better position than she had been before. If, therefore, it had been an ordinary claim for salvage the tugs would have been entitled to nothing, because there had been no success. The first question I have to consider is: What was agreed? There is a direct conflict of evidence. The agreement was entirely verbal—by hailing—between the ship and the tugs. Was it stated that the money was to be paid for beaching the ship, or was it not stated at all? Unless it was stated, then the work for which the money was promised was not a definite work at all, either for any measured service or in point of time. Undoubtedly it was in everybody's mind that the assistance of the tugs was for the purpose of beaching the ship in Whitmore Bay, and nobody contemplated anything else. The pilot of the Italian ship and the master had talked it over, and they did not contemplate anything else, and having regard to that fact, it is possible that a matter which was in everybody's mind should not be specifically mentioned. On the other hand, there was some independent evidence which supports the defendants' account of the conversation. The conclusion I come to on the question of fact is that the agreement was for 300*l.* and 150*l.* respectively, either for "putting the ship on the sands" or "beaching the ship on the sands."

But that does not, in my view, dispose of the case. If there was nothing else at all the plaintiffs clearly would not be entitled to recover, because the contract was for a lump sum in respect of a completed work, and the work was not completed. But the question arises: Why was the work not completed? Both parties to the agreement knew that the intended operation was the beaching of the *Valsesia* on the sands of Whitmore Bay. Both of them contemplated that the tugs would be used in that operation. Both knew that the anchor of the steamship was down, and that in order to carry out the intended operation it would have to remain down until a certain point and then be slipped, and they all knew that unless it were slipped at the proper moment the operation must fail. With that knowledge in their minds, they agreed to carry out this operation. In my view this case falls to be decided according to the ordinary principles of common law and no question peculiar to the law of salvage is involved. I think there was implied in such an agreement as this a mutual obligation at least to act with ordinary skill and care in carrying out the respective parts in the combined work. It was the duty of the tugs to obey the orders of those who were in command of the ship and to use skill and care in the handling of the tugs, and it was equally the duty of those in charge of the ship to use ordinary skill and care in carrying out their part of the contract, which was the slipping of the cable at the right time. This, indeed, was the essential part which the ship was to play in the combined operation. It was in that duty of slipping the cable that those on board the ship completely failed; the tugs had got the ship into the position contemplated by the pilot as the position when the cable ought to be slipped, but it was not slipped. While those on board the ship were trying to cut the cable—and they ultimately succeeded, after a long time, in doing so—the time of slack water had passed and the tide had turned, and then it is probable, as there was an exceedingly strong tide, that the tugs were no longer able to control the ship. But the pilot and the men on the tugs agreed in saying that, if the cable had been slipped when the pilot ordered it to be slipped, the contemplated

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operation would have been carried to a successful conclusion and the ship would have been beached in safety in Whitmore Bay.

The effect of these facts upon the legal position has been put in more than one way. I am not satisfied that, apart from negligence, the failure to slip the cable would inure to the benefit of the plaintiffs or would entitle them to say they could still recover the agreed sum. But I am clearly of opinion that if the failure to slip was due to negligence on the part of those on board the ship, the plaintiffs must be entitled in one way or another to be put in the same position as they would have been in if that negligence had never occurred, and if those in charge of the ship had carried out their duty towards the two tugs. I doubt very much whether the plaintiffs—apart from the ground of negligence and breach of contract by the defendants—can say that they must be treated as if they had performed the contract, and are entitled to recover the 300*l.* and the 150*l.* I find a difficulty in saying that anybody can recover a lump sum to be paid in respect of a completed work when, in fact, that work has not been completed. But if the plaintiffs were prevented from completing it by the negligence of those on board the ship, and if they were thereby deprived of the opportunity of earning the stipulated sums, then they are entitled to damages for the breach, through his agents, of the shipowner's obligations; and in this case the damages would be exactly commensurate with the stipulated sums, because the plaintiffs had in substance completed the whole of what they had undertaken to do. They had probably been saved no expense by reason that they were not able to complete the work.

The question therefore is: Has it been established that the shipowner, through his agents, was guilty of negligence? Such negligence, on the facts as I have stated them, has to be a breach of the implied undertaking towards the tugs. Prima facie, it seems to me that the failure to slip was the result of negligence. The pilot contemplated that the cable would be slipped and those on the tugs contemplated it, and it was not slipped. That seems to me to be prima facie evidence of negligence, and the Elder Brethren—as far as it is a matter of seamanship and therefore for them—are of opinion that everything in a well-found ship should be in a position for slipping in an emergency; but even apart from that, my own view, fortified as it is by the view of the Elder Brethren, is that the fact that the slipping—a quite ordinary matter in ship work—was not done when ordered by the pilot to be done is some evidence of negligence, and puts upon the defendants the duty of showing that the failure to slip arose without any negligence on their part. They have, in my opinion, wholly failed in that regard; indeed, it seems to me, looking at the evidence of the pilot, that it arose by reason of their negligence. It was an essential part of the operation that the cable at the proper time should be slipped, and the arrangement of the cable ought to have been such that it could be promptly slipped. It is said that it was so attached at the bare end that it could not be slipped, or, if slipped at all, only with very great difficulty. If that were the fact, then preparations ought to have been made so that it could be slipped at some links or so short of the bare end. The Elder Brethren advise me—and I am entirely of their opinion—that at and after the time when the tugs were engaged—up at any rate to the time when nearly all the cable had been paid out—preparations could have been made to secure that the cable should be slipped at the right moment. I find that the failure was due to negligence. The result is, assuming the true view of the law to be that the plaintiffs are not entitled to recover the 300*l.* and the 150*l.* under the contract as money earned, they are entitled to recover the same amount as damages, in that the defendants by the negligence of their servants prevented the plaintiffs from earning those amounts.

The only other question that I have to consider is as to whom the claim is against? I am not at all certain that the contract can be regarded as having been entered into on behalf of the ship and cargo; I am inclined to think that such a contract can only be regarded as having been entered into by the shipowner. But be that as it may, I cannot find that the negligence of those in charge of the ship was negligence in any other capacity than as servants of the shipowner, and therefore I think I cannot give judgment against anybody except the shipowner. That judgment must be in personam, because an action arising out of the negligent performance of such a contract as this, in my view, does not give rise to a right in rem. A little difficulty arises as to whether judgment can proceed against the owners in personam from the fact of the writ being directed against "the owners of the Italian steamship *Valsesia*"—and to that writ appearance being entered "for the ship *Valsesia* and freight." But the defence that was delivered in reply to the claim was obviously a defence on behalf of the owners of the ship, because it was therein pleaded that the statement of claim disclosed no case against the cargo; it was not pleaded that it did not disclose a case against the shipowner. Although that was the form in which appearance was entered, it was in fact on behalf of those who appeared as the owners of the *Valsesia*. The only alternative would be to pronounce that no appearance has been entered by the owners of the *Valsesia*, and in that case the plaintiffs would be in a position to obtain judgment in default of appearance. I do not think, however, that is the real position. I treat the defendants as having appeared as owners of the *Valsesia*, and judgment in personam can go against them. There will be judgment accordingly for the sums of 300*l.* and 150*l.* respectively, and judgment dismissing the claim as against the cargo owners. I give the plaintiffs their costs; there have been no extra costs by reason of the claim against the cargo owners.

Solicitors for the plaintiffs: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff.*

Solicitors for the defendants: *William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

E. C. M. T.

1926
July 21, 22, 23, 27, 28, 29, 30;
Oct. 25, 26.

1927
Jan. 14.

ADMIRALTY.

THE JUPITER (No. 3).

Shipping—Possession of Ship—Russian Company—French Administrator—Right to sue—Master—Bailee in Possession—Nationalization Decrees of Soviet Government—Foreign Sovereign State—Declaration of Ownership—Odessa—Ukrainian Socialist Soviet Republic.

In 1924, acting on behalf of the Union of Socialist Soviet Republics (the U. S. S. R.), an English company purported to sell the steamship *J.*, then lying at Dartmouth, to the defendants, an Italian company. The *J.* had belonged to a Petrograd company whose ships were registered at Odessa in the Ukraine, and the U. S. S. R. asserted that under nationalization decrees made in January, 1918, and March, 1919, all vessels of the Russian mercantile marine had become State property and that the company had ceased to exist. The *J.*, with other vessels of the company, had left Odessa in April, 1919, and business was carried on at Marseilles under the French equivalent of the Russian name. In 1920–21 the French Courts appointed an administrator of the ships, including the *J.* In March, 1924, the master, who had been in the service of the Russian company for many years, handed over the *J.* at Dartmouth to the representatives in London of the U. S. S. R. The present action was brought in the French name of the company, and in the name of the administrator and others against "the steamship *J.*," claiming possession. The Italian company appeared to the writ, but the defence was conducted in the name of that company by representatives of the U. S. S. R., and an affidavit by the Chargé d'Affaires for the U. S. S. R. was put in, in which he stated that at the time of the sale to the defendants the U. S. S. R. was in possession of the *J.* and was entitled to her ownership:—

Held (i.), that a declaration by the representative of a foreign sovereign as to the ownership of personal property in this country is not conclusive in an action between private persons when no question of the immunity of the sovereign State from the jurisdiction of the Court is concerned, and, it having been held that the U. S. S. R. was not impleaded by this action (*The Jupiter* (No. 2) [1925] P. 69), that the Court was at liberty to consider the evidence to see whether the *J.* had become State property.

(ii.) That the defendants had not proved that the nationalization decrees had the effect of transferring the property of the Petrograd company to the Russian Socialist Federative Soviet Republic; that Odessa was never at any material time within the territory of the R. S. F. S. R. or of the revolutionary Government of Northern Russia, which afterwards became the R. S. F. S. R., and that the *J.* never became the property of the U. S. S. R., or of the R. S. F. S. R., or of the Ukrainian S. S. R., two of the republics in that Union.

(iii.) That the decrees of the French Courts gave the administrator the right to the possession of the *J.*

(iv.) That the custody of the master of the *J.* was on behalf of the administrator; and

(v.) That no superior right having been made out, the administrator was entitled to a judgment for possession.

Under present day conditions, when ships do not pass beyond the control of their owners, as they did on foreign voyages in 1831, when *Moore* v. *Robinson* 2 B. & Ad. 817 was decided, the master cannot be regarded as having possession of the ship and cargo as a bailee.

ACTION IN REM for possession.

The plaintiffs, the Compagnie Russe de Navigation à Vapeur et de Commerce, M. Bourgeois, M. Tcheloff and M. Margoline, on behalf of themselves and others, trading as the Compagnie Russe de Navigation à Vapeur et de Commerce, "as sole owners of the steamship *Jupiter*" claimed a declaration that they were entitled to the possession of the ship.

An Italian company, the Cantiere Olivo Società Anonima, entered an appearance to the writ, but the defence was really conducted in the name of that company by the Union of Socialist Soviet Republics (hereinafter referred to as "the U. S. S. R.").

The facts are summarized in the headnote and are fully set out in the judgment.

Langton K.C. and *Carpmael* for the plaintiffs. The property of the Russian company outside Russia was vested by the French decrees in the administrator. Under those decrees he was entitled to the possession of the *Jupiter* and has the right to sue. The master was in possession for the administrator, who was unlawfully dispossessed, and, as against wrongdoers, possession is a good title and the defendants cannot set up a jus tertii: *Jeffries* v. *Great Western Ry. Co.* (1); *Eastern Construction Co.* v. *National Trust Co. and Schmidt* (2); *Farquharson Brothers & Co.* v. *King & Co.* (3) Further, a ship is not like an ordinary chattel, and the property on a ship does not pass by delivery: *Hooper* v. *Gumm.* (4) It is admitted that the Russian company itself has given no authority to sue; it has, however, not ceased to exist. At

(1) (1856) 5 E. & B. 802.
(2) [1914] A. C. 197, 210.
(3) [1902] A. C. 325.
(4) (1867) L. R. 2 Ch. 282, 290.

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most, the nationalization decrees of the R. S. F. S. R. would have the effect of liquidating the company, but not of transferring its property to the State: see *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1); *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (2); sub nom. *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* in the House of Lords (3); and *Banque Internationale de Commerce de Petrograd* v. *Goukassow.* (4) The ships at Odessa were never within the jurisdiction of the R. S. F. S. R., and none of its decrees nor the alleged seizures on the part of the Ukrainian S. S. R. had the effect of nationalizing the *Jupiter.*

[The arguments of both sides on this part of the case largely turned on the facts as to the political position of Odessa, and are fully set out in the judgment.]

If it be suggested that the affidavit of the Chargé d'Affaires of the U. S. S. R. is conclusive as to the rights of possession and ownership, the answer is that the Court of Appeal has held that the U. S. S. R. is not impleaded directly or indirectly in this action: *The Jupiter* (*No.* 2) (5); and, as between private individuals, the Court must decide these questions on the evidence. *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (6) is merely authority for the proposition that one of the effects of recognizing the U. S. S. R. as a sovereign State is that our Courts will not sit in judgment on acts of that State done within its own territory; it goes no further than that: see also the American decisions, *Oetjen* v. *Central Leather Co.* (7) and *Underhill* v. *Hernandez.* (8)

[Reference was also made to *The Winkfield* (9); *Lecouturier* v. *Rey* (10); *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd* (11); *The Lomonosoff* (12); Pollock on Torts, 12th ed., p. 374; and Westlake's Private International Law, 7th ed., p. 175.]

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(1) [1925] A. C. 112.
(2) [1926] 1 K. B. 1.
(3) Now reported [1927] A. C. 95.
(4) [1925] A. C. 150.
(5) [1925] P. 69.
(6) [1921] 3 K. B. 532, 545.
(7) (1918) 246 U. S. 297.
(8) (1897) 168 U. S. 250.
(9) [1902] P. 42.
(10) [1910] A. C. 262.
(11) (1924) 20 Ll. L. Rep. 308.
(12) [1921] P. 97.

C. R. Dunlop K.C., Dumas and *H. L. Murphy* for the defendants. It being admitted that the Russian company under its French name has never given authority to sue, its name should be struck out of the writ: see *Richmond* v. *Branson & Son.* (1) None of the plaintiffs, however, have any right to sue, collectively or individually. They cannot sue on behalf of the Russian company, for it has either ceased to exist, or, if it exists at all, it is as agent for the U. S. S. R.: see, as to the effect of the nationalization decrees of the U. S. S. R. the judgment of Bailhache J. in *Russian Volunteer Fleet* v. *The Crown.* (2)

[HILL J. Would the judge have come to the conclusions he did if he had had the advantage of the House of Lords' decision in *Mulhouse's* case? (3)]

In *Mulhouse's* case (3) it was held that, under the nationalization decree, the Russian bank was agent for the State. In that case, also, a liquidator had been appointed in this country, whereas no administration order has been obtained in the present case for the administration of the assets here. The French decrees merely authorized the administrator to manage the affairs of the former Russian company in France; they gave no rights of property. The so called board of administration was never in possession of the *Jupiter*, which after 1920 was in England. The master himself managed the vessel and was in the position of a bailee in possession: see *Moore* v. *Robinson.* (4) But even if he had possession for the administrator, that possession was lost when he handed over the vessel to the representatives of the U. S. S. R., and, unless the plaintiffs can put forward a better title than that of the persons in possession, they fail. On that question the affidavit of the Chargé d'Affaires for the U. S. S. R. is conclusive, and the Court cannot go behind it or investigate it: see the observations of Scrutton L.J. in *Sagor's* case. (5) It is true that the Court of Appeal held that this action did not so implead the U. S. S. R. that the writ could be set aside on preliminary motion, but it is, in fact, a specious impleading of the Union. If the Court, however, has any doubt as to what Government was in power at Odessa at the material dates the Foreign Office should be asked to make inquiries.

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(1) [1914] 1 Ch. 968.
(2) (1923) 15 Ll. L. Rep. 35, 74.
(3) [1925] A. C. 112.
(4) 2 B. & Ad. 817.
(5) [1921] 3 K. B. 532, 555.

[HILL J. No; as regards a de facto Government it is a question of evidence, and the evidence is closed. I shall not consult the Foreign Office.]

On the evidence the defendants have proved their case that, the head office of the company having been at Petrograd, its assets were nationalized by the decrees of the R. S. F. S. R., or were liquidated and had been transferred to that Republic, or that the ship was taken over at Odessa as national property by the local Soviet Government, which sent representatives to the All Russia Union of Soviets at Petrograd. The defendants therefore prove, as they are entitled to do, the jus tertii: see *Rogers, Sons & Co.* v. *Lambert & Co.* (1), and none of the plaintiffs are entitled to the possession claimed.

[Reference was also made to *Wilson* v. *Barker* (2); *Daimler Co.* v. *Continental Tyre and Rubber Co.* (3); *Archangel Saw Mills* v. *Baring Brothers & Co.* (4); Dicey's Conflict of Laws, 3rd ed., pp. 473, 474; and, by the Court, *The Broadmayne.* (5)]

Langton K.C. replied.

Cur. adv. vult.

1927. Jan. 14. HILL J. read the following judgment:—

In this action the plaintiffs claim possession of the steamship *Jupiter*. The ship at the date of the writ and arrest was lying at Dartmouth. The writ was originally issued in the name of the Compagnie de Navigation à Vapeur et de Commerce, which was stated in the writ to be a corporate body according to the laws of France, with their head office at 255, Rue St. Honoré, Paris. By subsequent amendments, three persons were added as plaintiffs, M. Bourgeois, M. Tcheloff and M. Margoline, who were expressed to be suing on behalf of themselves and others, trading as the Compagnie Russe de Navigation à Vapeur et de Commerce. Appearance was entered by an Italian company—the Cantiere Olivo Società Anonima. The defence has been conducted in the name of that company by representatives of the Union of Socialist Soviet Republics, commonly known, and hereinafter referred to, as "the U. S. S. R." Three main questions have to be determined: first, whether the plaintiffs, or any of them, have given any authority to sue; secondly, whether the plaintiffs, or any of them, had and have any such title to, or interest in, the ship as to give them the right to maintain an action of possession. The burden of those two issues is upon the plaintiffs. The burden of the third issue is upon the defendants. The third question is, assuming that any of the plaintiffs would otherwise have had any such title or interest, whether its acquisition has not been prevented, or its enjoyment destroyed, by a change in the property in the ship by virtue of governmental acts of the U. S. S. R., or its predecessors in sovereignty, the Italian company resting its right upon a transfer from the U. S. S. R., as owners, and alleging that the *Jupiter* had become the property of the U. S. S. R.

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(1) [1891] 1 Q. B. 318, 325.
(2) (1833) 4 B. & Ad. 614.
(3) [1916] 2 A. C. 307, 325.
(4) (1921) 37 Times L. R. 857.
(5) [1916] P. 64.

The first question was raised upon motion to set aside the writ, and was referred by the Court of Appeal to this Court. (1) Now that the facts have been ascertained, it is clear that no retainer has been given by the first named plaintiffs. There is no such corporate body according to the laws of France as the Compagnie Russe de Navigation à Vapeur et de Commerce. There is, or was, a corporate body of which the head office and seat of control were in Petrograd, under a style of which the French title is a translation, known for short as "Ropit." It never established a branch in France. It was in controversy whether it is an existing corporation. If it is non-existing, it cannot sue. If it is existing it has given no authority to sue. The name of the Compagnie Russe de Navigation à Vapeur et de Commerce ought to be struck out of the writ as a separate plaintiff. A retainer by

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(1) [1925] P. 69.

Messrs. Bourgeois, Tcheloff and Margoline was not disputed. Affidavits were filed by each of them. This disposes of the question referred to the Court by the Court of Appeal.

I now pass to the issues in the case, and first as to the right of the remaining plaintiffs to sue, either on their own account or in a representative capacity. So far as is necessary for this part of the case, the facts are as follow: In 1917 the *Jupiter* was one of a fleet of steamers owned by the Petrograd company—Ropit. The ships were registered at Odessa, and the management of them was entrusted to a managing director stationed at Odessa. In December, 1917, the *Jupiter* was at Odessa, and was there also on January 26, 1918, and March 4, 1918, and remained there till April 9, 1919. I am not quite sure that she was not there throughout all that period, but those are the specific dates mentioned in the evidence. I shall have later on to consider what was the political position of Odessa between November, 1917, and March, 1918; but for the present purpose it is enough to say that there was no settled form of Government there at that time. From March, 1918, to October or November, 1918, Odessa was in the occupation of the Austrians. From October or November, 1918, to April, 1919, Odessa was in the occupation of the French, together with General Denikin. On April 9, 1919, the *Jupiter* left Odessa; she went to Constanza, thence to the United Kingdom and thence to America. She was never again in a Russian port. Between August 28, 1920, and September 30, 1920, she was lying at Bordeaux. Except for this period she does not appear to have been in any French port. From Bordeaux she made a voyage to America and thence to the United Kingdom. She arrived in the United Kingdom in December, 1920, and was then laid up at Plymouth until September, 1922, and at Dartmouth from September, 1922, until March, 1924. On February 1, 1924, His Majesty's Government recognized the U. S. S. R. as the de jure rulers of those territories of the old Russian Empire which acknowledged their authority. On March 9, 1924, Jacob Lépine, who had been master of the *Jupiter* since

August 30, 1920, handed the ship's papers to representatives in England of the U. S. S. R., and the U. S. S. R. took actual possession of the ship. Then followed a writ in rem for possession, which was set aside on the ground that it impleaded the U. S. S. R. (1) The *Jupiter* remained in the actual possession of the U. S. S. R., and in September, 1924, a contract of sale of the ship was entered into between the Arcos Steamship Co., Ld., and the Cantiere Olivo Società Anonima. The Arcos Steamship Co., Ld., was acting on behalf of the U. S. S. R. By this contract the Arcos Co. guaranteed the buyers against claims by third parties. Actual possession was transferred to the buyers. On October 8, 1924, while the *Jupiter* still lay at Dartmouth, a claim for the return of the ship was made by the plaintiffs on the Cantiere Olivo Società Anonima, and was refused. The writ in the present action was issued on the same day.

When the *Jupiter* left Odessa in April, 1919, a number of other ships, which formed part of the Ropit fleet, left at the same time. A number of them proceeded to France. By the summer of 1920 some persons were carrying on business in France under the style of Ropit, or of its French equivalent —the Cie. Russe de Navigation à Vapeur et de Commerce. They were managing from an office in Marseilles the Ropit ships which had left Odessa. I was given no precise information as to who those persons were. It would appear from the decrees of the French Courts that they included some who were shareholders in the Petrograd company, and the names of a few such shareholders were given by M. Bourgeois in his evidence. All I can say is that there were in France a number of persons actually carrying on business under the name of the company, and actually managing the ships. The managing office was at Marseilles. There was also an office at Paris, which I gather was the head office. These persons had no communication with Petrograd, and did not act under any orders from any one in Petrograd. Nor did they recognize the authority of the Soviet Republics. Jacob Lépine was appointed master of the *Jupiter* on August 30, 1920. He had been in the service of Ropit for twenty-six years. He had left Odessa in another Ropit ship, the *Possadiuky*, and the French decree of June 8, 1920, shows that he was still master of that ship as late as June 8, 1920. It was not in so many words stated in evidence by whom he was appointed to the *Jupiter*. He said that at Marseilles he was ordered to take over the command. Alexieff, who was appointed chief engineer of the *Jupiter* in September, 1920, said that he himself was appointed by the Marseilles office of Ropit. Lépine said that he was paid by the Direction in Paris. A number of his receipts were put in, dating from May, 1921, to March, 1924. They relate to payments for wages, food, allowances and other laying up charges. They read in translation: "Received from the Marseilles office of the Russian Steam Navigation and Trading Company." On May 13, 1922, he signed an agreement adopting an agreement concluded in Marseilles on March 1, 1922, and expressed to be "between the Board of Ropit and the staff of the steamers." All I can definitely say is that Lépine was appointed master of the *Jupiter* by persons carrying on business in France under the style of Ropit or its French equivalent, and until March, 1924, he was paid by, and acted under the orders of, those persons, or of persons in France appointed under the French decrees to be presently mentioned. This at any rate is clear, that he was not appointed by the Petrograd office of Ropit, or by any one having the authority of the Petrograd company, if the Petrograd company still existed in 1920, nor was his appointment ever ratified and adopted by the Petrograd company. It is also clear that until the U. S. S. R. took possession in March, 1924, Lépine was in no sense the servant of the U. S. S. R.—he was not appointed or paid or controlled by it.

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(1) [1924] P. 236.

It is in my opinion important to understand the position of Lépine. One point made for the defendants was that the person in possession of the *Jupiter* in March, 1924, was Captain Lépine. This was put in different ways. One suggestion was that having been appointed master by the

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Petrograd company, and being unable to communicate with his principals, he possessed as negotiorum gestor of the Petrograd company. This suggestion falls to the ground when it is found that he never was appointed to the *Jupiter* by the Petrograd company. Another suggestion was that at common law the master of a ship has possession of it, as a bailee. Mr. Dunlop cited *Moore* v. *Robinson* (1), which accepted and applied *Pitts* v. *Gaince*. (2) But at the present day it is, in my opinion, impossible to regard the master as the bailee of a ship. In former days, when the master on a foreign voyage passed altogether beyond the control of the owners, and perhaps sold the outward cargo and bought a homeward cargo on owners' account, it might be possible to regard him as bailee of ship and cargo. Similarly, in the seventeenth century, the master seems to have been treated as the employer of the crew and responsible for the wages of the crew, and responsible for their negligence : see Marsden, 8th ed., p. 73, note (*d*). But to the conditions of modern commerce these considerations are quite inapplicable. The point is discussed by Pollock and Wright on Possession in the Common Law, pp. 60 and 138–9. After stating the rule that where an owner delivers a thing to a servant to be by him kept, used, carried or applied in the course of his employment as a servant . . . . the master's possession continues, they add, "it may be that it will sometimes as against strangers be treated as a possession in cases where the servant's charge is to be executed at a distance from the master and where the manner of the execution is necessarily left in a great degree to the discretion of the servant." In my judgment, Captain Lépine never was in possession of the *Jupiter* nor had he at any time the right to possession. He was a custodian merely. The person for whom he was custodian was in actual possession. The question is for whom was Lépine custodian ?

This brings me to the decrees of the French Tribunals. It is by virtue of these decrees that Messrs. Bourgeois, Tcheloff and Margoline contend that they had actual possession, and

(1) 2 B. & Ad. 817.

(2) (1700) 1 Salk. 10.

the right to possession, of the *Jupiter* in March, 1924, when, as they say, their servant, the master, wrongfully allowed the representatives of the U. S. S. R. to take possession. Lépine, as I have said, became master of the *Jupiter* on August 30, 1920. Four days later, on September 3, 1920, upon his application, the Commercial Tribunal of Marseilles appointed Maître Pelen "provisional administrator with power and mandate to watch over the interests of the Compagnie Russe de Navigation à Vapeur et de Commerce in the exploitation of the *Jupiter*." The *Jupiter* at the time was at Bordeaux, and not at Marseilles. Some question was raised before me as to the jurisdiction of the Marseilles Court, but upon the evidence I am satisfied that the decree of the Marseilles Court would be recognized as binding in France. A similar order had been made on June 8, 1920, with regard to six other Ropit ships, including the *Possadiuky*, of which Lépine was then master, and it would appear from later decrees that similar orders were made with regard to other Ropit ships. There were a number of subsequent decrees, but the decree of August 30, 1920, was the only one made while the *Jupiter* was in France. [His Lordship summarized the various decrees, and in particular one of April 10, 1923, which appointed M. Bourgeois provisional administrator of the property of Ropit situated outside Russian territory, and continued as follows:] On April 23, 1925, the U. S. S. R. applied to the Commercial Tribunal at Marseilles to cancel the decree of April 10, 1923, and allow the U. S. S. R. to retake possession of the vessels of Ropit. This was refused, and the refusal was confirmed by the Court of Appeal on December 23, 1925. I mention this decree because the recital states that the provisional administration was for the purposes of attending to the interests of the shareholders of Ropit and the members of the crews, and to safeguard the interests of creditors, until it is possible for the legal owners of the property of Ropit to re-enter into possession of their property. I should add that M. Bourgeois was still provisional administrator in March, 1924, and so continues. Of the three elected directors, M. Brodsky is dead. But

M. Tcheloff and M. Margoline were directors in March, 1924, and so continue. M. Bourgeois gave evidence before me. He said that he administered the *Jupiter* as he did the other ships; he paid the wages, etc.; he rendered his accounts annually to the Court. It appears from the decrees themselves that the provisional administrator was accountable to the Court.

What is the effect of the decrees as to the possession of the *Jupiter?* On this point I had the benefit of the evidence of French advocates. M. Allenes, called by the plaintiffs, had no doubt that a provisional administrator has legal possession of property which he has to administer. He said that the decree of September 3, 1920, gave the administrator legal possession of the *Jupiter*. He said that the later decrees had the same effect. But these were made at a time when the *Jupiter* was not in France. The decree of September 3, 1920, was made while the *Jupiter* was in France. There may be difficulties in this Court recognizing a right to possession given by a French Court to a ship which was neither French nor in French territory and which never after the right was conferred came within French territory. But no such difficulty arises as to a decree made while the ship was in the jurisdiction of the Court which made it. If M. Allenes' view of French law is right the decree of September 3, 1920, gave Maître Pelen the legal possession, the right to possession, of the *Jupiter*. M. Duhamel, called by the defendants, did not contradict this evidence of M. Allenes. He said that the decrees did not pass the property to the administrator. No one had suggested that they did. Indeed, the decrees all proceed upon the assumption that the original company was still existing and that the property was in it, and they provide for administration until the legal owners re-enter into possession. Apart from the evidence of the French lawyers, I should be of opinion that the effect of the decree of September 3, 1920, was to give the appointed administrator the right to possession of that which he was to administer—namely, the ship. I know not how else he was to administer it. I infer from the decrees that there was some controversy between the masters of the ships and the persons carrying on the business in France, and that the administrator was at first appointed to prevent those persons from dealing with the ships as they chose. Afterwards the interest of creditors and shareholders was considered, and the conflicting claims of the masters and the shareholders were met by entitling each to appoint directors to assist the administrator. But throughout the administrator was maintained, under appointment by the Court, and was answerable to it, and all attempts to get rid of a judicial administration of the ships were rejected by the Court. I hold that the decree of September 3, 1920, gave to Maître Pelen the right to possession of the *Jupiter*, and that this was a possession on his own account and not as agent for the Petrograd company or any one else. It was a possession under the Court. The administrator was appointed by the Court, could only be discharged by the Court, rendered accounts to the Court, and was answerable to the Court for his administration. His possession was none the less his own possession, because it was for the purpose of preserving the ship for the true owners. Maître Pelen continued to be sole administrator until August 12, 1921. From that date to the appointment of M. Bourgeois on April 10, 1923, he and M. Jaujon were co-administrators. This covers the period of the *Jupiter's* voyage from Bordeaux to America and thence to the United Kingdom, and her laying up at Plymouth and transfer to Dartmouth, and part of the time she lay there. For the rest of the time at Dartmouth up to March, 1924, M. Bourgeois was administrator. If I must give effect to the decree of September 3, 1920, I think I must equally give effect to the later decrees so far as they merely substitute one person for another as administrator. It seems to me that the jurisdiction of the French Court to make such substitution does not depend on whether the *Jupiter* was or was not in France at the time they were made. If I am wrong in this, the difficulty would be removed by the addition of Maître Pelen as a plaintiff, in the alternative. The legal position would in that case be this: right to possession in Maître Pelen under the decree of September 3, 1920, and ship in custody of those who at his request were appointed to exercise his rights, for the substitution was made at the instance of M. Pelen. The point is, therefore, one of form and not of substance. The result is that I hold that M. Bourgeois was entitled to possession of the *Jupiter* in 1924. If so, it is not of much importance whether the right to possession belonged to M. Bourgeois only or to M. Bourgeois jointly with Messrs. Tcheloff and Margoline. The evidence of the French lawyers was not, I think, directed to this point. On the whole I have come to the conclusion, with some doubt, that the right of possession was in M. Bourgeois only. It follows that the custody of Captain Lépine was for M. Bourgeois, as it had previously been for Maître Pelen. Captain Lépine was under the orders of and paid by the administrator for the time being, and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages, who else could have dismissed him? If he had incurred liabilities for necessaries on account of the ship, who else but the administrator would have been liable in personam?

The result of these considerations is that in March, 1924, when Lépine allowed the U. S. S. R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lépine may have acted as a loyal subject of the U. S. S. R., but be betrayed his trust to his employers. Prima facie the act of Lépine was wrongful. Prima facie M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. Prima facie M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court. When this fact—possession and right to possession in this country—is grasped, a good deal of the argument as to the right to sue, based upon a consideration of the cases of *Russian*

Commercial and Industrial Bank v. *Comptoir d'Escompte de Mulhouse* (1); *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (2); and of *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (3), is not material. If M. Bourgeois had possession, and the right to possession, here, and was dispossessed here, there can be no question as to his right to sue here. Judgment must be pronounced in his favour, unless the Cantiere Olivo Società Anonima can show that the U. S. S. R., who sold the ship to them, had a superior title. It is upon the title of the U. S. S. R. that the Cantiere defend. It is not said the Petrograd company is still the owner of the *Jupiter*, or that it, as owner, has a superior title to the possessory title of M. Bourgeois, or that the condition of the French decrees—namely, the re-entry of the Petrograd company into possession—has been fulfilled. The defendants' case is that before March, 1924, the Petrograd company had ceased to exist, and that all its property, including the *Jupiter*, had passed to the U. S. S. R.

Before I deal with that part of the case it will be well to dispose of the suggestion that, apart from a right by virtue of the French decrees, Messrs. Bourgeois, Tcheloff and Margoline are in some way entitled to sue in a representative capacity. I am unable to find any facts on which such a claim can be based. The decrees themselves show that the possession by the administrator was adverse to a possession by the persons in France, whether shareholders or others, who, before the appointment of an administrator, were managing the ships in France.

I now come to the question whether a title superior to that of the administrator has been established. The Cantiere Olivo Società Anonima set up a superior title derived from the U. S. S. R., as owners. Strictly the transfer to the Cantiere was not proved—for the contract of sale contemplated a bill of sale, and the bill of sale was not produced. It was said that it was with the authorities in Italy, and could not be produced. But no certified copy was produced. The point, however, is not material. In any case the Cantiere Olivo have to establish the right of the U. S. S. R., and are entitled to rely on the right of the U. S. S. R., from whom they derive possession, and upon whose title and by whose authority they are defending: see *Biddle* v. *Bond* (1) and *Rogers* v. *Lambert.* (2) This consideration makes it unnecessary to examine matters to which much evidence was directed—namely, the form of the authority of the Arcos Co. to sell, and the form of sale required by Russian law. What is pleaded is that by virtue of a decree of the Soviet Government of January 26, 1918, the *Jupiter* became the property of the Soviet Government, and that by virtue of a decree of March 4, 1919, the Petrograd company ceased to exist. Evidence was given on the one side and the other by a number of Russian gentlemen, some of them lawyers, upon matters of law and the constitutional history of Russia since 1917; there was also evidence as to what was done in the carrying out of the decrees. My difficulty, in dealing with this conflicting evidence upon matters which are in themselves obscure, is increased by the fact that these witnesses were not even agreed as to the correct translation of documents put in evidence.

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(1) [1925] A. C. 112.

(2) [1925] A. C. 150.

(3) [1927] A. C. 95.

But before I come to these witnesses I have to consider the point made by Mr. Dunlop, which, if sound, concludes the matter, and relieves me from any further consideration of the evidence. It is therefore naturally a very tempting proposition. An affidavit by M. Christian Rakovsky was put in. He stated that he was Chargé d'Affaires for the U. S. S. R., and that at the time of the sale to the defendants the U. S. S. R. was in possession of the *Jupiter* and was the owner, and entitled to the ownership, of such vessel. Mr. Dunlop's contention is that that statement by the representative of the U. S. S. R. is conclusive as to the facts stated and must be accepted by this Court. This contention was before the Court of Appeal on the hearing of the motion to set aside the writ in this action, and was referred to by Lord Justice Atkin. (3) What authority is there for the proposition that

(1) (1865) 6 B. & S. 225. (2) [1891] 1 Q. B. 318.
(3) [1925] P. 69, 78.

in the Courts of this country the declaration of a foreign sovereign is conclusive evidence that personal property in this country was or is the property of the foreign sovereign? I believe that that proposition holds good only in the case where the jurisdiction of the Court, or other jurisdiction of the Crown, is sought to be enforced against property, and in such cases is limited to the declaration that the property is the property of the foreign sovereign. It is involved in the principle that a foreign sovereign and his property are immune from the jurisdiction of the Crown, unless the foreign sovereign chooses to submit to it. Professor Dicey, in his Conflict of Laws, 3rd ed., p. 217, after stating the rule as to the immunity of a foreign sovereign from the jurisdiction, says: "The immunity, moreover, applies to the property of the sovereign to the fullest extent, provided that the property is shown to belong to the sovereign." But where jurisdiction is invited over property in this country as, for instance, by a writ in rem, the declaration of the foreign sovereign that the property is his must be accepted, for to investigate the truth of that declaration would be to determine the very question of jurisdiction which is in issue, and to exercise jurisdiction over the foreign sovereign, which the Court cannot do against the will of such sovereign. I have always so understood, and in many cases applied, the judgment of Brett L.J. in *The Parlement Belge.* (1)

But what authority is there for saying that where no question of immunity from jurisdiction is involved the declaration of the foreign sovereign as to the ownership of property must be accepted? And on what principle can such a rule be based? Suppose the foreign sovereign did not claim immunity and submitted to the jurisdiction, and the question before the Court was whether the property was, or was not, in the foreign sovereign, must the declaration of the foreign sovereign be accepted as conclusive? If so, then the declaration of a foreign sovereign would have greater weight than a declaration made on behalf of the King. In a question between the Crown and a private person as to the property

(1) (1880) 5 P. D. 197.

in chattels here, it surely would not be conclusive if a Minister of State made oath that the property was in the Crown. A fortiori, is the declaration of a sovereign to be accepted as conclusive when a question as to property is litigated between private persons, and the evidence produced by one of them is a declaration by a sovereign that the property had been in that sovereign ? Moreover, if the declarations of a sovereign as to the ownership of property, not made for the purpose of securing immunity from jurisdiction, are to be conclusive, there is no reason why the same force should not be given to all other declarations. Why call foreign lawyers to prove the fact or the effect of foreign law, if a simple declaration by the representative of the foreign sovereign would be conclusive ? What was the necessity for s. 7 of the Evidence Act, 1851, so far as foreign acts of State were concerned, if already such acts of State were conclusively provable by a declaration of the representative of the foreign sovereign ? Even if the question in issue be the passing of property locally situate in a foreign country, is it clear that the declaration of the foreign sovereign is conclusive ? Undoubtedly property passes according to the law of the place where it is situate. But if it is said to have passed by an act of State of the foreign sovereign, is that not a fact which must be proved in the ordinary way by proof of the act of State, of its application to the property, and of the local situation of the property ? For instance, the property in a ship is said to have passed under a sale by a maritime Court, following a judgment in rem. Must not the judgment be proved ? I cannot believe that a declaration by the representative of the sovereign of the Court which condemned the ship must be accepted as conclusive proof. In every such case the question seems to me to be one of fact, to be determined by evidence. The act of State must be proved by lawyers, unless it can be proved as provided by the Evidence Act, 1851. The meaning and the application of the act of State must also be proved by lawyers. The question whether the property or person alleged to be subject to the act of State was within the territory of the sovereign whose act is in question, is equally a matter of fact to be proved by evidence. And on all three points it seems to me that the evidence of the representative of the sovereign carries no more weight than that of any other competent witness.

Mr. Dunlop relied upon what was said by Scrutton L.J. in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1) The decision in that case is not in point, for the decree of the Russian Socialist Federative Soviet Republic admittedly had, and it was treated as having, the effect of nationalizing the goods in question, which at the time the decree was passed were admittedly within the territory of the R. S. F. S. R. The decision only applied the principle that the validity of the acts of an independent sovereign Government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country. Scrutton L.J. points out that if the Russian Government had itself brought the goods into this country, and by its representative declared that they were the property of the Russian Government, the Courts here could not investigate the truth of the allegation. This I understand to refer to a claim against the Russian Government. It is a statement of the rule that the Russian Government is immune from the jurisdiction of our Courts. It is impossible, he says, to recognize a Government, and yet claim to exercise jurisdiction over its person or property against its will. He says further, and it is on this that Mr. Dunlop relies: "If it (the Court) could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign State." I am not sure that I follow the use of the word "immunity" in this connection. Immunity, as I understand it, means immunity from jurisdiction. But the words are spoken with reference to an admitted state of facts—namely, that the goods were in the territory of the Russian Government, and while there became subject to an act of State of that Government, whereby they became the property of the Russian Government. In such a state of affairs our Courts could not deny that the Government could confer a good title to the property. It is governed by the general principle that every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of another done within its own territory. In my opinion, nothing that was said in *Sagor's* case (1) establishes Mr. Dunlop's proposition. In *Vavasseur* v. *Krupp* (2) the Court did consider an argument directed to show that the shells were not the property of the foreign sovereign, and pronounced it to be fallacious; though, as the proceedings were really directed against the shells, and the representative of the foreign sovereign declared them to be his property, it would look as if the case might be within the principle of *The Parlement Belge* (3), to which I have already referred. *Vavasseur* v. *Krupp* (2) was decided the year before *The Parlement Belge*. (3) I hold that M. Rakovsky's declaration is not conclusive.

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(1) [1921] 3 K. B. 532, 555.

I must consider the evidence to see whether the *Jupiter* became the property of the U. S. S. R. or of any one of the Republics which together form the Union. The two which are material are the R. S. F. S. R. and the Ukrainian Socialist Soviet Republic, which I will refer to as the Ukrainian S. S. R. If I understand the defendants' case, it is put thus: First, that the decrees of the R. S. F. S. R., which were acts of State having legislative effect, made on January 26, 1918, and March 4, 1919, dissolved the Petrograd company and transferred all its property, including the *Jupiter*, wherever that property was situated, to the R. S. F. S. R. Secondly, that if the decrees did not in themselves dissolve the company and transfer the property, they provided for the liquidation of the company and the transfer of the property, wherever situated, and that long before March, 1924, the liquidation was completed and the transfer made. These two contentions are independent of the question whether the *Jupiter* ever was within the territorial sovereignty of the R. S. F. S. R. They are based upon the fact that the head office of the company was in Petrograd, which undoubtedly was within the territorial sovereignty of the R. S. F. S. R. Thirdly, they say, as an alternative, that in the end of 1917 and the beginning of 1918 political power in Odessa was in the hands of Soviets there, and that they, acting as members of, or recognizing the sovereignty of, the R. S. F. S. R., seized the ships, and thereby made them the property of the R. S. F. S. R., or that their seizure, if made before the decree of January 26, 1918, was nevertheless a seizure for the R. S. F .S. R., and that the decrees, coupled with the seizure, transferred the property to the R. S. F. S. R. Fourthly, it is said, as a further alternative, that the Soviets at Odessa seized the ships as an independent sovereign, and that the Ukrainian S. S. R., which subsequently came into existence and exercised sovereignty in Odessa, is to be regarded as the successor of those who so exercised sovereignty in Odessa at the end of 1917 and the beginning of 1918.

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(1) [1921] 3 K. B. 532.
(2) (1878) 9 Ch. D. 351.
(3) 5 P. D. 197.

These third and fourth contentions have regard to the fact that the *Jupiter* was at Odessa. In considering these, it is vital to remember that from March, 1918, to April 9, 1919, though the *Jupiter* was at Odessa, yet Odessa was not territorially within the sovereignty of either the R. S. F. S. R. or the Ukrainian S. S. R. (which indeed had not come into existence), or of any persons to whom they can be regarded as successors in title, nor within the sovereignty of any persons who were of Bolshevik principles, or minded to confiscate private property. Whoever the persons were who seized the ships before March, 1918, they exercised no sort of political power in Odessa during the occupation of the Austrians and the French, except possibly for a few days in the autumn of 1918, between the Austrian and the French occupations; and before the French left, the *Jupiter* had already left Odessa, and was never thereafter within the territory of either the R. S. F. S. R. or the Ukrainian S. S. R.

As to the first contention, it seems to me that the decrees

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Hill J.

as to shipping enterprises of January 26, 1918, and March 4, 1919, go no further than the decrees as to banking and insurance enterprises, which were considered by the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1), as to banking, and in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2), as to insurance. To adopt the words of the Lord Chancellor in the latter case the decrees for nationalizing shipping companies, which have been put in evidence, were, at least, not stronger than the decrees for nationalizing banking and insurance companies. If so, they did not in themselves dissolve the Petrograd company, but merely at most provided for its liquidation. The question whether they nevertheless transferred at once the property of the company was the second question mentioned by the Lord Chancellor in the *Mulhouse* case (1): "Have they proved that the property in the bonds in dispute is no longer in the appellant company?" But the Lord Chancellor said it was unnecessary to consider the question, for counsel had deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country. Mr. Dunlop has not refrained from contending that the effect of the decrees was at once to transfer to the R. S. F. S. R. the property in the ships of the company, wherever situate.

Two questions are here involved: First, whether they at once transferred the property; and, secondly, whether they transferred the property, though it was not locally situate within the territory of the R. S. F. S. R. As to the first, it seems to me that if the decrees only provided for the liquidation of the company, they equally only provided for the transfer of the property upon the completion or in the course of the liquidation. I express this view with some hesitation, because I observe that in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2) Lord Sumner treats the *Mulhouse* case (1) as deciding that the decrees as to banking companies "did not dissolve the companies themselves, but only stripped them of their assets and

(1) [1925] A. C. 112, 119, 129.

(2) [1927] A. C. 95, 102, 108.

destroyed their goodwill by making banking a State monopoly."

If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so.

As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. If the *Jupiter* was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases: see, for instance, per Atkin L.J. in *Goukassow's* case (1); per Sargant L.J. in *Sedgwick, Collins & Co.'s* case in the Court of Appeal (2); and per the Lord Chancellor in the latter case in the House of Lords. (3) The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation. I am strengthened in this opinion by the view taken by the R. S. F. S. R. itself, as set forth in two circulars. The first, No. 42, is dated April 12, 1922, and was addressed by the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R. S. F. S. R. abroad. It sets forth that "the *régime* of property rights established by decrees of the Russian Soviet Power regulates property relations on the territory of the R. S. F. S. R. only," and continues: "But relations in connection with property rights where the objects thereof are outside the territory of the R. S. F. S. R., and are not connected with such territory, cannot be discussed outside the boundaries of the R. S. F. S. R. in accordance with Russian laws, and are determined by local legislation without regard to the nationality of the subjects of such rights, even if such subjects were Russian citizens." The second, No. 194, is a circular under date September 26, 1923. It is issued by the People's Commissariat of Justice to all District Courts. It was issued after the union of the R. S. F. S. R. and the Ukrainian S. S. R. had been formed, but in terms applies only to citizens of the R. S. F. S. R. It states that "property rights of citizens of the R. S. F. S. R., which have to be enforced outside the boundaries of the U. S. S. R., are to be determined by the laws of the country where such rights are to be enforced." These circulars show that the R. S. F. S. R. recognizes and enforces the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular recognizes that the nationalizing decrees do not operate upon property outside the territory of the R. S. F. S. R.

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(1) [1923] 2 K. B. 682, 693.
(2) [1926] 1 K. B. 1, 15.
(3) [1927] A. C. 95.

It will be convenient to examine the question whether the *Jupiter* ever was within the territory of the R. S. F. S. R. when I consider Mr. Dunlop's third contention. But I may at once say that I find, for reasons to be stated presently, that it is not proved that the *Jupiter* ever was within the territory of the R. S. F. S. R.

As to the second contention, the view that the decrees could not transfer property which was not in the territory of the R. S. F. S. R. applies equally whether the liquidation was completed or not. Moreover, at the date of completion, if completion ever took place, the *Jupiter* certainly was not in the territory of the R. S. F. S. R., even supposing that Odessa was in such territory, from November, 1917, to March, 1918. The liquidation is said to have been completed in December, 1918, at a time when Odessa, where the *Jupiter* lay, was in the occupation of the French and General Denikin. If it was completed by December, 1918, I am puzzled by the defendants' insistence on the decree of March 4, 1919. The defendants' evidence on this point is that of M. Kriloff and the file of the company at Petrograd, which he produced. These documents show clearly that up to November, 1918, the liquidation of the company had not been completed, but M. Kriloff said that he was a member of the board of

Ropit from 1913, that after the decree of January 26, 1918, some of the former directors remained at Petrograd, and other directors were elected from the Petrograd staff of the company and from the staff of the Petrograd agency of the company, that a Commissary was appointed by the authorities—he did not know by whom—and that in December, 1918, they handed over all the books and documents to officials of the Supreme Council, and the board was dissolved. It is certain that up to this time the ships of the company, other than those which were in Petrograd, or elsewhere in the north of Russia, had not been got into the possession of the R. S. F. S. R., and it therefore would look as if the chief part of the liquidation was still to be done. I am not able to find affirmatively that the liquidation was completed before the *Jupiter* left Odessa in April, 1919. I do not know that it would be against the interest of the plaintiffs if it were proved that the liquidation was completed in December, 1918. The *Jupiter* was at that time not within the territory of the R. S. F. S. R., for reasons which I shall presently state, and the result of a completed liquidation might be that the Ropit ships became bona vacantia, and the property of the first occupants, who were the persons who brought them to France. It is, however, the view of two of the Russian lawyers called by the plaintiffs that ships in the territory of the R. S. F. S. R. were nationalized before 1924. If so, the *Jupiter*, had it been within that territory, would have become the property of the R. S. F. S. R.

That brings me to Mr. Dunlop's third contention: Can Odessa be regarded as having at any material time been within the territorial sovereignty of the R. S. F. S. R.? In March, 1924, and to-day, Odessa is within the territory not of the R. S. F. S. R. but of the Ukrainian S. S. R. It has been within the territory of the Ukrainian S. S. R. ever since that Republic came into existence as a sovereign State. Evidence was given that since the Ukrainian S. S. R. was established it has always exercised jurisdiction over Odessa; that a Soviet form of Government was established in Odessa at the end of April, 1919, after the French left, and that thenceforward Odessa was in control of the Ukrainian S. S. R. (except that General Denikin's troops occupied it from August, 1919, till February, 1920). On December 28, 1920, a formal agreement of alliance was entered into between the R. S. F. S. R. and the Ukrainian S. S. R. which recognized the independence and sovereignty of each contracting party. On December 30, 1922, these two Republics as sovereign States entered into a treaty with the White Russian S. S. R. and the Transcaucasian S. S. R., and on July 6, 1923, the constitution of the four Republics was agreed and the Union—the U. S. S. R.—created. It thus appears that the sovereignty of the Ukrainian S. S. R. and that of the R. S. F. S. R. are quite distinct—though for certain purposes the two Republics act together—and that from April, 1919, the only sovereign of Odessa has been the Ukrainian S. S. R. During the French occupation and the Austrian occupation, whoever was the sovereign, it was not the Ukrainian S. S. R. (which had not come into existence) nor the R. S. F. S. R., nor any form of Soviet authority; during that period there cannot have been any persons exercising political authority to whom the Ukrainian S. S. R. must be treated as successors—still less any to whom the R. S. F. S. R. must be treated as successors.

What was the position between November, 1917, and the occupation by the Austrians in March, 1918? Several witnesses have given an account of what happened. It is perhaps not surprising that they do not agree. The political position was very confused. In the first place, in November, 1917, a Ukrainian Socialist Republic—not a Soviet Republic—was proclaimed, and on January 11, 1918, its Government issued a manifesto declaring an independent sovereign State of the Ukrainian people. It was proved that it had its own army and financial and judicial system. Its seat of Government was Kiev. Its representative body was the Rada. In November, 1917, the Council of People's Commissaries of the R. S. F. S. R. passed a decree, which is in the nature of a remonstrance and almost an ultimatum to the Ukrainian Rada. The significance of this is that the document recognizes the Ukrainian People's Republic while complaining that the Rada does not recognize the authority of Soviets in the Ukraine. There is also the significant fact that the Ukrainian People's Republic was a party, as also was the R. S. F. S. R., to the Treaty of Brest-Litovsk, concluded with the Central Powers in February, 1918. The witnesses on the one side and the other differ as to whether Odessa was within the Ukraine, and whether the Rada exercised any authority there. The Rada claimed sovereignty over Odessa, and the R. S. F. S. R. refused to admit the claim; there were discussions between the two Governments during 1918, which ended in neither giving way. So long as Odessa was in the occupation of the Austrians or French, these discussions related to the future and not the present. There is evidence that during the Austrian and French occupations (March, 1918, to April, 1919) the Rada exercised some authority in Odessa. But I can find no evidence that it exercised any effective authority from November, 1917, to March, 1918. There was evidence that from November, 1917, to November, 1918, the Ukraine was in a state of civil war with a Soviet or Bolshevik party in most places. I think the proper inference from the evidence is that the Soviet or Bolshevik party in Odessa were masters of the town and port from November, 1917, till the arrival of the Austrians in 1918. It is, however, a long step from that fact to saying that that party was exercising the sovereignty of the R. S. F. S. R., whose seat of government was in Petrograd or Moscow. The evidence altogether fails to satisfy me that I ought to take that step.

The conclusion at which I am inclined to arrive is that the persons who seized the ships in Odessa were acting on their own account and independently of any sovereign, or as exercising sovereignty on their own account, imitating, it may be, the proceedings of the revolutionary Government in Petrograd, but not acting in obedience to it or as if they were members of the political society ultimately designated as the R. S. F. S. R. At best, I am left in doubt. The defendants have failed to prove that which it was for them to prove. What is their evidence? M. Alexieff began by saying that in December, 1917, the sailors at Odessa nationalized all the vessels. He then said that this was done by the Council of Nine. He said that a Soviet form of Government was already formed in Odessa by October, 1917, and that a Council of Nine was appointed by the supreme organization, the executive of Soviets in Odessa; that the Council of Nine called upon the Union of Sailors to appoint an Economic Commission; and that this Commission took an inventory of the ships and handed over all the documents to the Council of Nine, and the Council of Nine then worked the ships and paid the wages of the crews. He says that the nationalization was completed in February. All that he says about Petrograd is that the Soviets in Odessa were in touch with Petrograd and sent delegates to a congress of Soviets at Petrograd in 1917—he thinks after the second conference in October, 1917. He made no reference to the decree of January 26, 1918.

M. Glouschenko says there was a Soviet in Odessa after October, 1917, chosen by the various Unions of Workmen and Soldiers, and that it sent delegates to two congresses of Soviets in Petrograd. He says that the decree of January 26, 1918, was published in Odessa on the following day, and was put in force in Odessa by the Council of Nine, which was appointed by the Soviets in Odessa. He also says that at the end of November, 1917, he and three others were sent by the office of the Ropit, whose managing director was still in Odessa, to get money from the Council of People's Commissaries at Petrograd, and that he got it and brought it back to Odessa, and that there was continuous communication between Odessa and Petrograd. He said also that the military force in Odessa was provided by the Soviets in Odessa. I find it very difficult to reconcile this evidence with much of M. Alexieff's. If the nationalization was begun in December, 1917, how was it done under the decree of January 26, 1918? If Odessa sent to Petrograd and obtained money for the working of the ships, it is remarkable that M. Kriloff, who continued to act at the head office in Petrograd, knows nothing about it. He said: "I do not remember if we asked for money for Odessa or got any." Further, contradicting M. Glouschenko, he says that in the early part of 1918 there was no post or telegraph or railway communication between Odessa and Petrograd. The file of the Ropit Co. supports this. It shows how little Petrograd knew of what was taking place at Odessa. On February 16, 1918, there is a minute of a decision "to get into contact with the south"; and on March 30, 1918, there is a report of all the information received from Odessa, which was meagre, but, so far as it went, agrees rather with M. Alexieff's account than with M. Glouschenko's account. It reads as follows: that "on January 6 the Odessa section of the Sailors' Union proclaimed the entire fleet of the Russian company the property of the union. Later on the democratic organizations and the professional unions of Odessa acknowledged that the Sailors' Union is to be regarded as a transitory measure to the nationalization of the fleet of the Black Sea and the Sea of Azof. To safeguard the same as a national property, on January 12 a Council of Nine was formed for the general management of the affairs of all waterways and transport in the region indicated above. This Council of Nine was composed of representatives of the following democratic organizations" (naming them). "The said Council of Nine proposed to Ropit that they should continue their service under the council's control and guidance, which the Odessa administration consented to do. The board has no further information about the affair." I am not quite clear whether the dates are old or new style; but at any rate they are all dates before January 26, 1918.

M. Schvettau said that in the autumn of 1917 the Government of Odessa changed to a Government of Soviets, and that in the beginning of 1918 the Soviet Government was in actual control of Odessa, and that it appointed a Commissar to the University. All that this comes to is that there was a Soviet form of Government at Odessa at that time.

M. Poushkine was not at Odessa. He said that in 1918 the position at Odessa was very peculiar, and that the R. S. F. S. R. was very anxious to retain power over the Black

Sea ports. His evidence does not help me on the point now under consideration. M. Krougliakoff was of opinion that from November, 1917, to March, 1918, the Soviets at Odessa exercised power, acknowledging the sovereign authority of the supreme Soviet power in Petrograd. But he gave no facts to support his view. His opinion was based on the assumption that the Petrograd Government succeeded to the sovereignty over all the territories which had been territories of Imperial Russia. There is nothing to justify this assumption. As a lawyer's view it is opposed to the lawyer's view of Dr. Idelson, that the R. S. F. S. R. never was sovereign of any territory except Northern Russia.

In the course of the evidence there was put in a decree dated December 1, 1917, which is described as a " Decree of the Second All-Russian Congress of Soviets of Workers', Soldiers', and Peasants' Deputies respecting the establishment of the Council of People's Commissaries." This is one of the congresses of Soviets held in Petrograd. It is difficult to regard these congresses as having sovereign power. They are rather in the nature of meetings of delegates of party organizations. The congress is styled an All-Russian Congress of Soviets. But on December 1, 1917, for reasons which I have already stated, no Soviet organization had sovereignty in the territory of the Ukrainian Socialist Republic. If the Soviets in the Ukraine sent deputies to the congress of December 1, 1917, they were not there as members of a sovereign body. Similarly, if the Soviets in Odessa sent delegates to the congress, it does not follow that they attended as members of a sovereign body. The decree contemplates the convening of a Constituent Assembly. The evidence was that such an assembly was convened in Petrograd in January and came to no decision and was no more heard of. There is no evidence that the Soviets in Odessa sent delegates to this assembly. The decree says that the management of separate branches of State life is given to committees, and that the governing power belongs to the Collegium of Chairmen of these Committees, that is the Council of People's Commissaries, subject to the All-Russian Congress of Councils of Workers', Peasants', and Soldiers' Deputies and its Central Executive Committee. There is no evidence that the Soviets of Odessa ever sent a chairman of their committee to Petrograd as a member of this Collegium.

The decree of January 26, 1918, on which the defendants rely, is expressed to be a decree of the Council of People's Commissaries. It provides for the appointment of Commissaries to take charge of the shipping companies' offices. There is no evidence that that was done by the Soviets at Odessa. Those Soviets had in fact begun to seize the ships on their own account long before the decree of January 26, 1918, and after the decree of January 26, 1918, they continued to do it in their own way, without regard to the decree of January 26, 1918, until in March, 1918, their activities were put an end to by the arrival of the Austrians.

I was also referred to a copy of a paper, The Voice of Revolution, of March 9, 1918. Its office was in Odessa. M. Glouschenko said it was the official paper of the Soviets. It styles itself " Organ of the Executive Committee of Soviets of Workers', Soldiers' and Peasants' Deputies of the Rumanian Front and Region." It reports some decrees or orders made in Petrograd and speaks of the Russian Republic. This is a small bit of evidence to support the view that the Soviets of Odessa recognized the sovereignty of the persons in power at Petrograd. But it carries me a very little way.

Taking the evidence as a whole, and I think I have set out the whole of the evidence, I am quite unable to find that Odessa was at any time within the territory of the R. S. F. S. R. or of the revolutionary Government of Northern Russia which afterwards took definite form as the R. S. F. S. R.

As to Mr. Dunlop's fourth contention, the persons who seized the ships—whether the Sailors' Union or some association of Soviets in Odessa—either seized them as robbers or seized them as an independent sovereign and made them the property of that sovereign. But their sovereignty, if sovereignty it was, came to an end in March, 1918, and was never revived. And how can I regard the Ukrainian S. S. R. as their successors? There was a complete break. No doubt, if a Government originates in revolution and is then established as a Government, and is then recognized by this country, the recognition is retroactive and recognizes the acts of the Government from its beginning: see *Sagor's* case. (1) But that supposes a continuity in the governmental activities of the persons so recognized. What was the beginning of the governmental activities of the Ukrainian S. S. R.? Certainly there were none in Odessa until after the *Jupiter* had left Odessa. I can see less reason for saying that a seizure by the Soviets in Odessa resulted in the property in the ships being in the Ukrainian S. S. R. than for saying that the retaking of the ships by the persons who controlled them during the occupation of the Austrians and the French, and ultimately removed them to France, vested the property in those persons.

In my judgment the defendants have not shown that the property in the *Jupiter* ever was in the U. S. S. R. or any of the Republics forming the U. S. S. R. In my view, therefore, each of these contentions fails, and the defendants have not discharged the burden which rested upon them on this part of the case.

The result is that, in my judgment, M. Bourgeois in March, 1924, was wrongfully deprived of possession, and that no one has established any title superior to that of M. Bourgeois. In arriving at this conclusion, I have not considered it necessary to consider how far the Ukrainian S. S. R. adopted, or by what means the Ukrainian S. S. R. adopted, the legislation of the R. S. F. S. R. There may be some other matters that were discussed before me which I have not considered, but if I have not considered them it is because in my view the conclusions at which I have arrived make it unnecessary for me to consider them. I find that M. Bourgeois has made out a prima facie right and is entitled to judgment, unless a superior right is made out. No superior right has been made out, and therefore M. Bourgeois must have judgment for possession. Bail has been given in the sum of 7800*l.*, and there will be judgment against the defendants and their bail for that amount with costs.

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(1) [1921] 3 K. B. 532, 543, 549.

Solicitors for the plaintiffs: *William A. Crump & Son.*
Solicitors for the defendants: *Wynne-Baxter & Keeble.*

E. C. M. T.

1927
Jan. 12;
Feb. 8.

DIVORCE.

WALLER *v.* WALLER.

Discharge of an Order for Separation and Maintenance of Wife on the Ground of her Adultery—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 5, 7, 8—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *ss.* 1, 11—*Limitation of Time for Application for Discharge.*

The first part of the Summary Jurisdiction Act, 1895, s. 7, confers a jurisdiction which may be exercised at any time. The peremptory provision contained in the latter part of the section for the discharge of an order already made under the Act on the ground of the adultery of a married woman is part of the jurisdiction of justices to make orders for the payment of money or otherwise referred to in the Summary Jurisdiction Act, 1848, s. 1. By the Summary Jurisdiction Act, 1895, s. 8, all applications under that Act are to be made in accordance with the Summary Jurisdiction Acts, and the Summary Jurisdiction Act, 1848, s. 11, directs that any complaint or information shall be made or laid within six calendar months from the time when the matter of the complaint or information arose.

A complaint under the Summary Jurisdiction Act, 1895, s. 7, that a married woman has committed adultery results in an order for payment of money "or otherwise," and is therefore subject to the six months' limitation.

A wife obtained an order for separation and an allowance in 1912. In 1926 justices purported to discharge the order by reason of adultery of the wife found by them to have been committed in 1915:—

Held, that the justices had exceeded their jurisdiction and that the case must be remitted.

APPEAL from an order of a court of summary jurisdiction rescinding a previous separation order obtained by a wife under the Summary Jurisdiction Act, 1895, s. 5, on the ground of her adultery.

The wife, Vannagusta Lilian Waller, had on March 4, 1912, obtained an order that she should be no longer bound to cohabit with her husband, Charles Waller, with consequential relief. On November 4, 1926, the justices of Windsor discharged the previous order on the complaint of the husband that since the date of it—namely, in the year 1915—the wife had committed adultery. The wife appealed to this Court on several grounds, but the material question argued and decided was whether the justices had jurisdiction at the date of the order appealed from to rescind the previous order on the grounds of the adultery of the wife committed in 1915.

G. O. Slade for the appellant. The justices were wrong. There was no jurisdiction to discharge the order on the ground of adultery. More than six months had elapsed since the adultery. By the Summary Jurisdiction Act, 1895, s. 8, all applications under the Act are to be made in accordance with the Summary Jurisdiction Acts. By the Summary Jurisdiction Act, 1848, s. 11, the complaint must be made within six months from the time when the matter of the complaint arose. In *Ellis* v. *Ellis* (1) the President (Sir F. H. Jeune) says: "In allowing the summary remedy provided for by this Act (the Summary Jurisdiction Act, 1895), the Legislature, in such cases as the present, has thought right to prescribe that complaint shall be made within six months. But, if that time be exceeded, there remains the right to come to this Court, which can give relief, unless there has been undue delay."

[LORD MERRIVALE P. Is the application in the present case a complaint within the sense of that word, as used in the Summary Jurisdiction Act, 1848, s. 11 ?]

In *Weightman* v. *Weightman* (2) a court of summary jurisdiction held that it had no jurisdiction to entertain a similar application to the present, under s. 7 of the Act of 1895, because the adultery in question was before the date of the separation order and six months had elapsed since the order. Although the Divisional Court allowed an appeal from the court of summary jurisdiction it did so on the express ground that the adultery having been prior to

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(1) [1896] P. 251, 254.

(2) (1906) 22 Times L. R. 362.

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the order, the application to rescind the order was in the nature of an application for a new trial. That case does not conflict with the argument for the present appellant on the question of time. In fact, the learned President (Sir J. Gorell Barnes) in the Divisional Court expressly said that the six months' limitation did not apply in the special circumstances of the case.

J. P. Eddy for the respondent. *Weightman* v. *Weightman* (1) in the Divisional Court is distinguishable. The effect of s. 7 as a whole is that the application to discharge may be made at any time and not necessarily within six months.

The six months' limitation applies to an original complaint and not to an application to discharge.

THE PRESIDENT (LORD MERRIVALE) [after dealing with the facts and with grounds of appeal which do not call for report continued :] There is a ground of appeal based upon the terms of a section in the Summary Jurisdiction (Married Women) Act, 1895, which, subject to modification by the recent statute of 1925 (15 & 16 Geo. 5, c. 51), governs the jurisdiction of the justices upon complaints of this kind. Sect. 7 of this Summary Jurisdiction Act makes two classes of provisions. It provides first, that justices, after an order has been made within their jurisdiction under the statute, can hear either the husband or the wife to show cause upon fresh evidence why the justices should not alter, vary or discharge any such order. With regard to that provision, it is comprehensive enough to be employed at any time. No doubt its primary purpose is to enable justices upon fresh evidence to retry an issue, but its effect is not exhausted by retrial of an issue. Its effect extends, in the specified case of change in the means of the parties, to the consideration and variation of an order upon matters which have occurred since the making of the order. I am not professing to delimit the operative effect of the respective parts of the provisions in the first half of s. 7; I need say only this, that part of the section deals with matters which may be dealt with at

(1) 22 Times L. R. 362.

any time. Within that part of the section, upon a complaint properly made, it was open to the justices to receive proof that their order of 1912 had been an unjust order, because the applicant was an adulterous wife, and, if the summons, which was before the justices, when they made the order now appealed from, had proceeded in respect of adultery before the original order, it may well be that they would have felt it their duty to deal with that order. No summons was before them which provided for a rehearing of the case on which the order had been made. What was before them was a charge of subsequent adultery. Now the question is whether the comprehensive provision in the first half of the section, which enables the justices at any time to discharge an order in respect of new evidence, relates to this case, in which evidence of adultery subsequent to the order was received and acted upon, although it was evidence of an act of adultery alleged to have taken place eleven years before the hearing before the justices. On behalf of the appellant it has been said that the second half of the section relates specifically to this matter, and that the jurisdiction of the justices in respect of acts of adultery after the order is to discharge the order under the second half of the section, whereby if any married woman, upon whose application an order shall have been made, shall commit an act of adultery, " such order shall upon proof thereof be discharged." There is no doubt of the peremptory authority of the justices to discharge an order upon proof of an act of adultery committed after the making of the order. It may well have been the intention of the Legislature that that should be the extent of the authority of the justices with regard to that class of misconduct.

What has happened in the present case is that the order being fourteen years old, an act of adultery which was eleven years old has been alleged, with no particulars of it, upon a summons issued in August, 1926. The wife appeals against the order of the justices, so far as this ground is concerned, upon the authority of s. 11 of the Summary Jurisdiction Act of 1848, which by reference is incorporated

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in the Summary Jurisdiction (Married Women) Act of 1895. In order to see the effect of the Summary Jurisdiction Act of 1848 upon the Act of 1895, it is necessary to have a clear regard to its terms. The first section provides that in all cases where an information shall be laid, " that any person has committed or is suspected to have committed any offence or act within the jurisdiction of such justice or justices, for which he is liable by law, upon a summary conviction for the same before a justice or justices of the peace, to be imprisoned or fined," that act of his may be the subject of a summons which will direct him to appear before the justices. This case is not within that provision. There is no information here of any offence within the jurisdiction of the justices for which the defendant on the summons, the wife, was liable to be imprisoned, or fined, or otherwise punished within the meaning of that distinction in the Act of 1848. But there is another power besides that of summoning persons guilty or suspected of being guilty of offences. That power relates to cases " where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise." There is a like provision that in every such case it shall be lawful for the justices to issue a summons requiring the appearance of the accused party before them. That is the provision of s. 1 of the Act of 1848. Then s. 11 limits the time for proceeding. It directs that in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

The first question for consideration is whether the summons to the wife in this case was issued upon a complaint within the meaning of s. 1 of the Summary Jurisdiction Act of 1848. The complaint which is referred to there is a complaint in a case where the justices have authority by law to make an order for the payment of money, or otherwise, and those, who are familiar with summary jurisdiction, know that at that time, and increasingly as time has gone on, matters within the jurisdiction of the justices where they have authority to make an order, which are not matters punishable by fine or imprisonment, but are matters upon which they have jurisdiction, are brought before the justices by summons on a complaint. This is not a complaint on which the justices had authority to make an order for the payment of money. The ordinary complaint under the Summary Jurisdiction Act would have been such a complaint as invokes in the first instance the jurisdiction of the justices. The real question on this part of the case is whether the matter alleged is a matter of complaint in respect of which the justices have authority to make an order otherwise than for the payment of money. In my judgment the order which they made, discharging the order of 1912, is included within the terms of s. 1 of the Act of 1848. It is not an order for the payment of money, but it is an order otherwise than for the payment of money. It is an order to discharge from the payment of money. It is a complaint on which the justices had jurisdiction to find the accused person, so far as that jurisdiction extends, guilty of adultery. In my judgment, therefore, when the justices dealt in September last with a complaint that the wife, the now appellant, had been guilty of adultery in 1915 and proceeded thereupon to make an order for the discharge of a previous order, that was a proceeding which was outside the jurisdiction of the justices by reason that, within the meaning of s. 11 of the Act of 1848, the matter of such complaint arose at the time when the alleged act of adultery was committed—namely, in 1915. It may well be said—at least the observation will occur—does not such a view place a husband who has a guilty wife in a difficulty and, prima facie, in an unjust position? There was a time when that observation could have been made more effectively than it can now, though, taking it at any time, if a husband under an order for the payment of money for the maintenance of his wife takes so

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little notice of her doings that he is not aware for twelve years whether she is living chastely or not, it may be thought that he prefers to pay rather than to take care. But there is this further to be said, that at the present time by means of the provisions for poor persons' litigation, especially in this Division, there is abundant opportunity for a man whose wife has been guilty of adultery and who has not put himself in an impossible position, as a complainant, to proceed to obtain a divorce. It is said that the now respondent, the husband, has taken proceedings with a view to obtaining a divorce. It is suggested, on the other hand, that he is an impossible suitor for divorce. With those considerations this Court has nothing to do. What follows, according to my view of the matter, from what I have said, is that when the justices in September of last year made an order finding the now appellant, the wife, guilty of adultery in 1915 upon a complaint made in August of last year, they were outside their jurisdiction. My view is that the justices have power to discharge an order for payment of money to a wife, if complaint of an act of adultery of the wife is brought within six months of the time when it has been committed.

For these reasons in my opinion this appeal must succeed in this way, that the order must be discharged, but that the proceedings must be remitted to the justices in order that they may do what in their judgment justice requires, either by hearing the parties upon a new complaint, or in any other mode within their jurisdiction. But upon the new complaint it must be borne in mind that if there are reasons why an act of adultery which is alleged to have occurred is not available to the complainant, the justices will hear those reasons.

I think for the reasons I have stated that the appeal succeeds, and that the case ought to be remitted to the justices.

HILL J. I agree. I think the justices have proceeded upon the view that the case came within the last sentence of s. 7, and that they had power to set aside an order on proof of adultery, however long ago that adultery took place. The question to my mind is this: Is the procedure on this application by the husband a complaint within s. 11 of the Summary Jurisdiction Act of 1848? First of all, it seems to me that it is an application under the Act of 1895, s. 8. Then does the Summary Jurisdiction Act of 1848 apply to this complaint? I entirely agree with what my Lord has said, that it is a complaint upon which the justices have authority to make an order for payment of money, or otherwise. In this case it was for the discharge of an existing order for the payment of money. If so, does s. 11 of the Summary Jurisdiction Act of 1848 apply? It does, unless there are words in s. 7 of the Act of 1895 to show that it does not apply. Sect. 7 does make it inapplicable to certain proceedings. Application to vary, or discharge on fresh evidence may be made at any time. Application to vary the amount may be made at any time. But otherwise it seems to me that s. 11 applies. In this case more than six months from the adultery which is the cause of complaint had elapsed, and, that being so, I agree that the justices were not under any compulsion under the second sentence of s. 7 to set this order aside, and that it must go back to them to consider the circumstances on a rehearing and see whether they think it is a case in which they ought to set aside the order upon the evidence that will be then tendered to them. But it is satisfactory to know that there is always open to the husband a remedy much more satisfactory for him to pursue, and which he indicated he had some intention of pursuing—namely, to petition for a divorce in this Court—and no injustice and no hardship is being inflicted upon him by the course we have pursued.

The PRESIDENT. Then the order is set aside in the mode I have indicated.

Solicitors for the wife: *Bower, Cotton & Bower, for T. W. Stuchbery & Son, Maidenhead.*

Solicitor for the husband: *C. T. Lewis.*

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[IN THE PROBATE DIVISION AND IN THE COURT OF APPEAL.]

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Divorce—Alimony pendente lite—Wife found guilty of Adultery on Petition for Divorce by Husband—Husband found guilty of Conduct conducing to Wife's Adultery—Husband's Petition dismissed—Subsequent Petition by Wife for Divorce on Ground of Husband's Adultery—Wife maintaining herself without Assistance from Husband—Power of Court to award Alimony pendente lite—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 22, 31—*Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 32; *s.* 103, *sub-s.* 1; *s.* 190, *sub-s.* 3.

By s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925: " On any petition for divorce or nullity of marriage the Court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation " :—

Held, that the effect of the sub-section was not to confine the power of the Court to make interim orders to cases in which the facts were such as would warrant the Court in making an order in proceedings for judicial separation, but to confer on the Court a general power to make interim orders of the same nature and class as could be made in properly instituted proceedings for judicial separation.

Held, therefore (affirming the decision of the President), that a wife found guilty of adultery in a suit for divorce brought by her husband, whose petition had been dismissed because by his conduct he conduced to her adultery, was nevertheless a competent suitor for dissolution of marriage on the ground of her husband's adultery, and if she presented a petition for divorce the Court had jurisdiction under sub-s. 3 of s. 190 of the Act of 1925, in its discretion, to award her alimony pendente lite.

Held, further, that as the means of the wife were insufficient to support herself and her two children, she was entitled to alimony pendente lite although the husband had contributed nothing towards her maintenance for seven years before the institution of the suit, and she had been able in some precarious fashion to maintain herself.

Burrows v. *Burrows* (1867) L. R. 1 P. & M. 553 and *George* v. *George*, ibid., distinguished.

Petition by wife for alimony pendente lite.

The parties were married on March 9, 1909, and there were two children of the marriage. On February 5, 1917, the wife obtained an order for maintenance against the husband under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground of his cruelty. On June 4, 1918, the husband filed a petition for divorce against the wife on the ground of her adultery with one Benjamin Looseley.

By her answer dated July 30, 1918, the wife denied that she had committed adultery. The petition was heard on January 22 and 23, 1919. The wife was given leave to amend her answer by alleging that the husband had been guilty of cruelty and of conduct conducing to her adultery, and on January 23, 1919, Lord Coleridge J. found that the wife had been guilty of adultery, but that the husband had been guilty of conduct conducing to the wife's adultery, and he dismissed the petition with costs. The husband then applied under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to discharge the maintenance order on the ground that the wife had committed adultery, and the order was discharged on March 3, 1919. The wife appealed to the Divisional Court against the discharge of the maintenance order, but on May 23, 1919, her appeal was dismissed. From May 23, 1919, until June 29, 1926, the husband made no payment to the wife for her maintenance, though from 1923 he had contributed towards the cost of educating the two children. On June 29, 1926, the wife presented a petition for divorce on the ground of the husband's alleged adultery with a named woman. By his answer to that petition dated September 1, 1926, the husband admitted that he had committed adultery with the person named in the petition, but alleged that on January 23, 1919, the wife had been found guilty of adultery by Lord Coleridge J., and had since that date frequently committed adultery, and he prayed that her petition might be dismissed. No reply had been filed by the wife when the present proceedings were heard.

On July 30, 1926, the wife presented a petition for alimony pendente lite. By his answer to that petition, the husband alleged that the wife was capable of maintaining herself, and relying on the facts that on January 23, 1919, she had been found guilty of adultery by Lord Coleridge J., and that in consequence of such adultery the maintenance order had been discharged, he submitted that she was not entitled to alimony pendente lite. The wife by her reply said that she was not capable of maintaining herself, and that the husband's petition had been dismissed with costs on

January 23, 1919. On November 23, 1926, the registrar ordered that the husband should pay to the wife alimony pendente lite at the rate of 10*s*. a week, and that he should pay the annual sum of 100*l*. towards the maintenance of the children. On the same day the husband issued a summons to rescind the registrar's order. The summons came before the President on November 29, 1926, and was adjourned into Court for argument. (1)

Acton Pile for the husband. The wife has been found guilty of adultery, and the Court has therefore no power to grant her alimony pendente lite. By s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925, power is given to the Court to make interim orders for alimony on petitions for divorce or nullity of marriage only to the same extent as the

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(1) Sect. 22 of the Matrimonial Causes Act, 1857, provided: "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." This section is repealed by the Supreme Court of Judicature (Consolidation) Act, 1925.

The Supreme Court of Judicature (Consolidation) Act, 1925, ss. 32, 103, sub-s. 1, and 190, sub-s. 3, are as follows:—

Sect. 32: "The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of Court, and where no special provision is contained in this Act or in rules of Court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly appertained."

Sect. 103, sub-s. 1: "Save as is otherwise provided by this Act or by rules of Court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the Courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or with rules of Court, may continue to be used in the High Court and Court of Appeal respectively in the like cases and for the like purposes as those in and for which they would have been applicable in the former respective Courts."

Sect. 190, sub-s. 3: "On any petition for divorce or nullity of marriage the Court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation."

Court could make such orders in proceedings for judicial separation. Under s. 103, sub-s. 1, of the Judicature (Consolidation) Act, 1925, and s. 22 of the Matrimonial Causes Act, 1857, the principles and rules which applied to such orders in the Ecclesiastical Courts are to be followed. But in the Ecclesiastical Courts a wife guilty of adultery could not have maintained a suit for divorce a mensa et thoro, therefore no order for alimony pendente lite would have been made in circumstances resembling the present case, where the wife has been found guilty of adultery, though that adultery had been conduced to by her husband's conduct. The plea of "conduct conducing" was unknown to the Ecclesiastical Courts and was a creation of the Matrimonial Causes Act, 1857.

[He referred to *Whitmore* v. *Whitmore* (1); *Wells* v. *Wells and Hudson* (2); *Ashcroft* v. *Ashcroft and Roberts* (3); *Wilson* v. *Glossop* (4); *Seaver* v. *Seaver* (5); *Brooking-Phillips* v. *Brooking-Phillips* (6); *Dart* v. *Dart* (7); *White* v. *White* (8); *Prichard* v. *Prichard* (9); *Goodden* v. *Goodden* (10); *Morgan* v. *Morgan* (11); *Drummond* v. *Drummond* (12); *Holt* v. *Holt and Fleeming* (13); *Everett* v. *Everett and McCullum* (14); *Otway* v. *Otway*. (15)]

Moreover, the husband and wife had been living apart for many years before the institution of the suit, and the wife has supported herself during the separation and is still able to do so. It is not the practice to allot alimony pendente lite in such circumstances: *Burrows* v. *Burrows* (16); *George* v. *George*. (16)

T. J. O'Connor for the wife. Alimony pendente lite is in substitution for the common law right of a wife to pledge her husband's credit for necessaries and should be subject

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(1) (1866) L. R. 1 P. & M. 96.
(2) (1864) 3 Sw. & Tr. 542.
(3) [1902] P. 270.
(4) (1887) 19 Q. B. D. 379.
(5) (1846) 2 Sw. & Tr. 665.
(6) [1913] P. 80.
(7) (1863) 3 Sw. & Tr. 208.
(8) (1859) 1 Sw. & Tr. 591.
(9) (1864) 3 Sw. & Tr. 523.
(10) [1892] P. 1.
(11) (1841) 2 Curt. 679.
(12) (1861) 2 Sw. & Tr. 269.
(13) (1858) 28 L. J. (P. & M.) 12.
(14) [1919] P. 298, 310.
(15) (1888) 13 P. D. 141.
(16) L. R. 1 P. & M. 553.

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to the same considerations. In *Govier* v. *Hancock* (1) it was laid down without qualification that if a wife had committed adultery, the husband's liability to maintain her determined. But that rule had since been varied, and a husband is now liable to maintain his adulterous wife if he has connived at her adultery: *Wilson* v. *Glossop.* (2) The same considerations should apply when the husband has by his conduct conduced to his wife's adultery.

[He referred to *Rees* v. *Rees* (3); *Crampton* v. *Crampton and Armstrong.* (4)]

In so far as the Ecclesiastical Courts laid down any principle that a wife guilty of adultery should not have alimony pendente lite, that position disappeared when the Matrimonial Causes Act, 1857, by s. 31 made conduct conducing to adultery by the petitioner a discretionary bar to relief, and made a wife whose adultery had been conduced to by her husband's conduct, a competent petitioner for divorce. In *Wickins* v. *Wickins* (*No.* 2) (5) the right of a wife to be maintained by her husband even after she had committed adultery was recognized.

[He also referred to *Durnford* v. *Baker* (6); *Cooper* v. *Lloyd* (7); *Smith* v. *Smith and Tremsaux* (8); and *D'Oyley* v. *D'Oyley and Baldie.* (9)]

Cur. adv. vult.

Dec. 20. THE PRESIDENT (LORD MERRIVALE). The petitioner in this suit is suing for divorce on the ground of her husband's adultery. Pending the suit she has applied for and obtained in the Registry an order for weekly payments by way of alimony pendente lite. Against this order the respondent appeals. The registrar has coupled with this order for alimony an order for payment by the respondent of moneys for the maintenance of the children of the marriage.

(1) (1796) 6 T. R. 603.

(2) (1888) 20 Q. B. D. 354, 356, 358.

(3) (1821) 3 Phillim. 387.

(4) (1863) 32 L. J. (P. & M.) 142.

(5) [1918] P. 282.

(6) [1924] 2 K. B. 587.

(7) (1859) 6 C. B. (N. S.) 519.

(8) (1863) 4 Sw. & Tr. 228.

(9) (1859) 4 Sw. & Tr. 226.

This also was included in the respondent's notice of appeal, but the appeal in respect of this has not been proceeded with.

The ground of the respondent's appeal against the order for alimony pendente lite is that in a previous suit wherein he was petitioner for dissolution of marriage the now petitioner was found guilty of adultery. Counsel on his behalf contended that there is no jurisdiction in the Court to allot alimony pendente lite to a wife so found guilty or to a wife shown to be guilty by her own confession. This proposition is founded on authorities in divorce, such as *Holt* v. *Holt and Fleeming* (1); *Whitmore* v. *Whitmore* (2); and numerous decisions under the common law which lay down that a wife, living apart from her husband and guilty of adultery, may not pledge her husband's credit for necessaries, and that in the case of such a wife certain statutory liabilities of a husband in respect of maintenance cannot be enforced.

Holt v. *Holt and Fleeming* (1) and *Whitmore* v. *Whitmore* (2) were simple cases. In the former alimony pendente lite was refused in a suit for divorce upon proof that in an Ecclesiastical Court the respondent had already been found guilty of adultery. In the latter, upon a wife's confession of adultery in the course of the proceedings on a petition for divorce, an order for alimony pendente lite which was then subsisting was, as from the date of the confession, discharged. In like cases the same course would probably be taken to-day.

The present case is complicated, however, by the fact that the decree of the Court in the husband's suit, which pronounced the guilt of the wife, found the husband guilty of conduct conducing to the wife's adultery, and therefore dismissed his petition. This state of facts was said by the wife's counsel to bring the case within the principle laid down in *Wilson* v. *Glossop* (3), that a husband who connives at adultery on the part of his wife remains under the same liability for the wife's maintenance as though she had remained chaste.

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(1) 28 L. J. (P. & M.) 12.
(2) L. R. 1 P. & M. 96.
(3) 19 Q. B. D. 379; 20 Q. B. D. 354.

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So far as the argument on the husband's behalf goes to the jurisdiction of the Court to order payment of alimony in a case like the present, it depends upon the provisions of the Matrimonial Causes Acts, 1857 and 1907, which are re-enacted in the Judicature (Consolidation) Act, 1925, whereby under s. 190, sub-s. 3, power is given to make interim orders for alimony in a petition for divorce "as in proceedings for judicial separation," and under s. 32 of that Act this jurisdiction is to be exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly appertained. The last mentioned section, if examined, maintains with regard to proceedings for judicial separation the provision of the Matrimonial Causes Act, 1857, s. 22, whereby the Court is to proceed therein on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts theretofore acted and gave relief.

Concisely stated the argument was this: A suit for divorce a mensa et thoro by a guilty wife could not have been maintained; therefore no order for alimony pendente lite in such a suit could or would have been made; consequently no such order can be made under s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925, in a suit for divorce instituted by a wife who has been guilty of adultery.

As a test of a wife's right to an allotment of alimony in a case like the present I was asked to determine whether she could sue for restitution of conjugal rights and to hold that she could not. Cogent reasons for not embarking on this inquiry are suggested by the conflict of opinion as to the true view of the ecclesiastical law regarding the matter which is evidenced in *Seaver* v. *Seaver* (1); *Hope* v. *Hope* (2); *Russell* v. *Russell* (3); *Brooking-Phillips* v. *Brooking-Phillips* (4); and many other cases. However the answer would not be necessarily decisive of the present dispute.

The conformity to the principles and rules of the Ecclesiastical Courts which is prescribed by the statutes is such

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(1) 2 Sw. & Tr. 665.

(2) (1858) 1 Sw. & Tr. 94.

(3) [1895] P. 315; [1897] A. C. 395.

(4) [1913] P. 80.

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conformity as may be had, due regard being given to the provisions of the Matrimonial Causes Act, 1857, and the rules and orders thereunder. The Act of 1857 instituted the jurisdiction of the Court to dissolve marriage, and it expressly provided that the adultery of a petitioner should not be an absolute bar to a decree. True it is that alimony pendente lite has been refused or discontinued in cases where adultery was established simpliciter against a guilty wife, but in cases where connivance or conduct conducing is alleged or established these decisions give little guidance. Nor are they necessarily decisive in any case of mutual guilt. So long as a wife was a competent suitor in the Ecclesiastical Court in a matrimonial cause the general practice of those Courts was to require the husband to make provision according to his means for her maintenance and the costs of her suit. I know of no ground for doubting the accuracy of the statement on this subject contained in Oughton's Ordo Judiciorum, Tit. 206, 207.

The wife in this present suit is a competent suitor, in that she sues for relief which the Court is able, upon proper proof, to afford to her. Moreover the husband is not free of complicity in the misconduct on her part, as has been established in his suit by the decree of the Court. Whether after such misconduct the wife could pledge the husband's credit for necessaries is not the question. The decisive inquiry, in my view of the matter, is whether the wife, on the facts before the Court, is a competent suitor for relief in a matrimonial cause. She undoubtedly is. Thereupon the jurisdiction of the Court to order alimony pendente lite appears to me to arise. It is that jurisdiction which has been exercised in the Registry.

Conditions are easily conceivable in which, although this jurisdiction exists, no order could properly be made. A wife who has brought cohabitation to an end by admitted misconduct for which the husband was not to blame, or a wife who, in some independent situation, is seeking divorce, and cannot be granted relief except under the discretionary power of the Court, may very likely not be a proper applicant for an allotment of alimony pendente lite. That will depend upon consideration of the relevant facts. In dealing with these regard must be had not only to the decisions in cases like *Holt* v. *Holt* (1) and *Whitmore* v. *Whitmore* (2), but to the state of the existing law of divorce, under which the Court has the responsibility of deciding, not only as to innocent wives but as to guilty wives, whether provision of some sort should be made for the wife by the husband.

There is jurisdiction to make an order in the present case and I see nothing in the facts which ought to induce the Court to overrule the discretion of the registrar as to the order proper to be made. The appeal therefore fails.

Leave to appeal was refused.

C. M.

On December 21, 1926, the husband obtained the leave of the Court of Appeal to appeal from the order of the President on his undertaking to pay the wife's costs of the appeal in any event.

The appeal was heard on January 11, 1927.

Acton Pile and *Hutchinson* (*C. S. Rewcastle* with them) for the husband.

Merriman K.C. and *T. J. O'Connor* for the wife.

The arguments were substantially the same as those used in the Court below. The following additional cases were referred to: *Noblett* v. *Noblett and Kershaw* (3); *In re Wingfield & Blew* (4); *Foden* v. *Foden* (5); *Parry* v. *Parry* (6); *Allen* v. *Allen and D'Arcy*. (7)

LORD HANWORTH M.R. This is an appeal from a decision given by the President on December 20 last, by which he confirmed an order of the registrar made on November 24 last, that a sum of 10*s*. per week should be paid by the respondent husband to his wife, who is the petitioner in a suit for divorce brought by the wife against the husband.

(1) 28 L. J. (P. & M.) 12.
(2) L. R. 1 P. & M. 96.
(3) (1869) L. R. 1 P. & M. 651.
(4) [1904] 2 Ch. 665.
(5) [1894] P. 307.
(6) [1896] P. 37.
(7) (1859) 30 L. J. (P. & M.) 2.

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The argument which we have had has raised a somewhat interesting point. The judgment of the learned President was delivered after he had taken time for consideration, after the case had been argued on more than one day before him. He however refused to give leave to appeal, probably on the ground that the amount involved was a very small one. The amount of alimony which is to be paid pendente lite is, as I have said, 10*s*. per week and no more. Assuming that the petition was not heard for a full six months, an unlikely hypothesis, the amount involved would be no more than 13*l*. The President, as I have said, refused leave to appeal to this Court. On an application made to my brother Lawrence and myself at the end of last Sittings, we thought it right, as the case was one in which the learned President had delivered a considered judgment, to give leave to appeal on the terms that in any event the appellant should make himself liable for the costs of the appeal. On those terms the appellant now brings the case before us. He claims that the order of the registrar, so confirmed by the learned President, was wrong on two grounds.

Before, however, I state and deal with those grounds it is necessary to state the facts quite shortly. The petitioner was married to the respondent on March 9, 1909. Two children were born of the marriage. In 1918 the husband presented a petition for divorce against his wife on the ground that she had committed adultery. At the hearing it was proved that the wife had committed adultery, but the learned judge, Lord Coleridge J., before whom the case was tried on January 22, 1919, allowed an amendment to be made to the answer of the wife pleading as against the husband cruelty and conduct conducing to her adultery. Giving his judgment on January 23, 1919, Lord Coleridge J. found that the wife had been guilty of adultery, but he dismissed the husband's petition on the ground that the husband himself had been guilty of cruelty and of conduct conducing to the wife's proved adultery. Before that hearing there had been, as early as February 5, 1917, an order for maintenance made in the police court under s. 5 of the Summary

Jurisdiction (Married Women) Act, 1895. After the decision had been given by the learned judge finding the wife guilty of adultery an application was made before the late Mr. Waddy, the police magistrate, that the order of February 5, 1917, should be revoked on the ground that the wife had now been proved to have been guilty of adultery. Accordingly, acting under s. 7 of the Act of 1895 the Court discharged the order that had been made some two years previously. Pausing there, by March, 1919, there were decisions, first, of the Divorce Court, and, secondly, of the police court, recognizing the decision of the Divorce Court, that the wife had been guilty of adultery. From the time that that order for maintenance was revoked by Mr. Waddy no payment was made to the wife by the husband. He had been in the habit, however, for some time previously of making payments to her towards the school fees of his children. Those payments he has continued to make up to the present time, and no question arises as to them. On June 29, 1926, the spouses having lived apart from the time of the earlier proceedings down to the present time, the wife filed a petition charging her husband with adultery. On September 1 of last year the husband filed an answer admitting his adultery with the particular person named, but charging the petitioner, his wife, with adultery with a certain man named Ricketts. On July 30 the wife filed a petition for alimony pendente lite. The husband put in his sworn answer on September 1, in which he alleged that his means were not such as had been represented, and in para. 6 made the following statement: "On the 23rd day of January, 1919, the petitioner was found guilty of having committed adultery by the Rt. Hon. Lord Coleridge sitting as a Justice of the High Court in the Divorce Division." Then by para. 7 he alleged that: "In consequence of such adultery a maintenance order made on the 5th February, 1917, by the court of summary jurisdiction sitting at the North London Police Court on the application of the petitioner was discharged on the 3rd March, 1919, on the application of the respondent and such decision was subsequently upheld by the Divisional Court." Then in

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para. 8 he said: "For the above reason I submit that the petitioner is not entitled to any order for alimony pendente lite." To that the petitioner replied by affidavit, in which she said (para. 3): "I am not capable of maintaining myself. I earn a little money by selling goods on commission but it is only sufficient to enable me to live and pay the rent of one room. I have two children to support, one being an invalid. I receive no money for maintenance from any person whatsoever. The man Ricketts referred to in the respondent's answer died in New Zealand about 18 months ago."

Upon those materials the matter went before the registrar in the ordinary course. He made an order against the respondent to the petition, the present appellant, that he should pay as alimony pendente lite the sum of 10*s.* per week to his wife. As I have already said the President confirmed that order. It is from that confirmation by the President that this appeal is brought.

Two points are raised by counsel for the appellant: (1.) that the petitioner, the wife, having been found guilty of adultery, there is no power in the Court to grant alimony pendente lite; and (2.) that where one spouse has been separated from the other, and that spouse has been able to maintain herself, no order for alimony ought to be made pendente lite; for if it were made, the spouse who makes the application would be improving her position by getting an order for alimony, whereas she has by the facts of the case shown that she is able to maintain and support herself independently of contributions from her husband.

The first point depends upon the interpretation to be given to the statutes. Under s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925, which repeals a previous enactment, there is power to order alimony pendente lite. By s. 190, sub-s. 3, it is provided: "On any petition for divorce or nullity of marriage the Court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation." The argument is that

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although that section undoubtedly gives power to order alimony pendente lite, it does so only to the extent to which the Court has power to do so in proceedings for judicial separation. Looking back to s. 32 of the same Act it is provided as follows: "The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of Court, and where no special provision is contained in this Act or in rules of Court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly appertained." Going still further back, by s. 22 of the Matrimonial Causes Act, 1857, it is provided: "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

The argument then is that this power to give alimony pendente lite is similar to the power which the Court has in proceedings for judicial separation, that s. 22 comes in because it applies to suits or proceedings for judicial separation, and that the powers which have to be exercised by the Court are to be such as would have been exercised in cases of petitions for judicial separation, not more. It is perhaps right at once to observe that s. 22 says that the limitation or direction given under it is to be exercised "subject to the provisions herein contained and to the rules and orders under this Act." One of the provisions contained in that Act which was new was instituted by s. 31, whereby the Court was to pronounce a decree declaring a marriage to be dissolved if satisfied on the evidence that the case of the petitioner had been proved, and had not found that the petitioner had been in any manner accessory to or conniving at the adultery of the other party to the marriage or had condoned it, with this important further proviso, that the Court was not bound to pronounce such a decree if the party applying for the decree had been found to be guilty of such misconduct as had conduced to the adultery.

It is said on the authority of *Otway* v. *Otway* (1) and other cases, such as *Everett* v. *Everett* (2), that a judicial separation can only be granted where the petitioner comes to the Court with a pure character and is free from all matrimonial misconduct. It is argued that the present petitioner comes before this Court with a decision given by Lord Coleridge J. that she has been guilty of adultery, that the police magistrate revoked the order for payment of maintenance because she had been found guilty of adultery, and that therefore, if her position is to be tested by whether she would be able to get a judicial separation, she, upon proof of the decision of the High Court, would fail, because it has been established against her that she is not of pure character, but has been guilty of adultery. Those two cases are cases in which adultery was considered simpliciter without any question of disability arising on the part of the other spouse to rely upon it by reason of his conduct conducing, and may be dealt with, to use a not inconvenient phrase, as cases of adultery simpliciter. I desire, however, to observe that in *Everett* v. *Everett* (2) it is clear that the ground on which the Court refused to act in favour of the petitioner was that when he came before the Court he was compelled to admit that at the time the petition was launched and at the moment when the action of the Court was invited he was still living in adultery. Those two cases appear to deal with the position and rights of persons in reference to a final decree. They do not deal with the position of persons who are applying for an interim order in the course of the conduct of the case pendente lite.

The case upon which Mr. Acton Pile is entitled to rely as the strongest in his favour appears to me to be *Holt* v. *Holt* (3), in which the learned judge there said that inasmuch as the

(1) 13 P. D. 141.
(2) [1919] P. 298.
(3) 28 L. J. (P. & M.) 12.

wife had been found guilty of adultery the petitioner could no longer have been compelled to support her, and thus there was no right on her part to ask for alimony. That decision appears to be based upon the principle that alimony is to take the place of the right on the part of the wife to pledge her husband's credit for necessaries. There is some authority for that view in the recent case which was cited by my brother Lawrence L.J., but whether that be the true view of alimony, that it depends upon the right of the wife to pledge her husband's credit for necessaries or not, it appears to me that that point does not arise in the present case. If we were considering the wife's right to pledge the husband's credit for necessaries, it would be clear that a wife who has been guilty of adultery loses that right. That is in the case of what I have called adultery simpliciter. But as was pointed out by Scrutton L.J. in *Durnford* v. *Baker* (1), following Sir James Shaw Willes in *Cooper* v. *Lloyd* (2) and also *Govier* v. *Hancock* (3), there may be cases in which the husband is not entitled to impute adultery against the wife, as in the case where, subsequently to the adultery, there has been condonation. There may be cases where, although there has been adultery it was not available to the husband to take advantage of it, as where there has been connivance and now, under the section of the statute I have read, where there has been conduct conducive. In this case the right of the husband to impute adultery against his wife is circumscribed and lost by his own conduct.

I have dealt so far with the argument which has been presented to us, although it appears to me that our decision must lie within a smaller compass. It appears to me that in the present case, inasmuch as the finding of Lord Coleridge J. was that although the wife had been guilty of adultery the petitioner, her husband, was not entitled to rely upon it because of his conduct conducing, we have not a case in which adultery simpliciter can be imputed against the wife. Gorell Barnes J., in a passage which has been read to us in

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(1) [1924] 2 K. B. 587, 599.

(2) 6 C. B. (N. S.) 519, 524.

(3) 6 T. R. 603.

Parry v. *Parry* (1), has pointed out that conduct conducing to adultery may vary greatly in degree, and he there devotes some time to the explanation of that view. It is plain from the action of Lord Coleridge J. in dismissing the husband's petition that he did not regard the husband as free from fault. The husband lost the right he would otherwise have had by reason of his conduct conducing.

In those circumstances it appears to me that the cases which have been cited to us are not really in point, and that the decisions in *Otway* v. *Otway* (2) and *Everett* v. *Everett* (3), which deal with final decrees, do not restrict the power of the Divorce Court in the matter of an order for alimony pendente lite. We have to give effect to s. 31, or not overlook it, and to remember that in interpreting the action of the Court within s. 22, that s. 31, with its proviso as to misconduct conducing to adultery, is one of the provisions subject to which s. 22 was passed. In those circumstances it appears to me that it would be a misinterpretation of the powers of the Court and an increase of the limitation put upon its powers if we were to hold that there was no power to grant alimony because of a conviction of the wife of adultery. The learned President pointed out that the wife was a competent suitor. What may be the ultimate fate of her petition we do not know, but it cannot be said that her petition could be ordered to be withdrawn from the file on the ground that she was incapable of presenting it by reason of the fact that she has been guilty of adultery; and inasmuch as she may say against her husband that the adultery was due to his conduct conducing, he cannot rely upon it as definitely preventing her from taking proceedings. If, therefore, she is, as I agree with the President she is, a competent suitor, it appears to me that s. 190, sub-s. 3, comes into play, and that giving full weight to the limitation imposed by s. 22 it is necessary for the Court to bear in mind the effect of s. 31, and in those circumstances to say that there was power in the Court to make an order for alimony pendente lite at

(1) [1896] P. 37, 40.

(2) 13 P. D. 141.

(3) [1919] P. 298.

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a time when the measure or quality of the wrong to be imputed to the husband and to the wife has not been finally determined between them. It appears to me therefore that the first ground on which the case has been argued fails.

The second point is, that where the spouses have been living separately from each other, the wife is not entitled to improve her position by getting an order for alimony pendente lite. Shortly put, that is really based upon the theory that the right to grant alimony is based solely upon the right of the wife to pledge her husband's credit. At the present moment it is doubtful what the position of the wife may be on that issue. The question of conduct conducing once more may come into play for the purpose of still rendering the husband liable, notwithstanding the fact that his wife has committed adultery. It appears to me that on this point also we cannot neglect the effect of conduct conducing, and that it would be wrong to say that she is benefiting herself by obtaining an order for alimony. She is in circumstances which justify the Court in considering whether it will make an order. If an order has been made the Court would be slow to interfere with the discretion of those who made it. I do not think myself that the basis of alimony pendente lite is solely to be considered from the point of view of whether or not the wife at the time could have pledged her husband's credit. But if that be the basis of it, it seems by no means certain that the wife has lost that right. On the second division of points—namely, that inasmuch as she has been able to support herself and that there was no evidence at all on which the Court could make an order—it appears to me that the evidence before the Court was not sufficient to oust or prevent it exercising its jurisdiction, for all that the Court had before it was evidence that the wife had been able to get along in some fashion by a precarious course of life, and that the means which she herself had were insufficient to support herself and her two children.

In those circumstances, it appears to me that the registrar had abundant material upon which he could make the order,

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and as he has made the order I think it would be wrong for this Court to disturb it. For these reasons I think the appeal must be dismissed with costs.

SARGANT L.J. I am of the same opinion. I will compress my remarks as far as possible. Under s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925, the Court on any petition for divorce or nullity of marriage has the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation. The appellant here reads that sub-section as if the words were that the Court should have power to make, not the same class of interim orders, but to make orders in the same class of cases as the Court could do in suits for judicial separation. The argument is this, that if the suit had been one for judicial separation the wife would necessarily have been barred both from ultimate relief and from an interim order for alimony by the fact of her adultery, and that therefore that must be so even in this suit, which is a suit for divorce or nullity. It appears to me that that argument is quite ill-founded, because the class of cases in which a wife may get relief by way of decree for dissolution or nullity is more extensive than the class of cases in which the wife may get a judicial separation.

By the language of the sub-section in question the power to grant alimony is a general power in suits for divorce or nullity and not merely in suits for divorce or nullity of the same character as, or brought in circumstances similar to suits for judicial separation. The learned President has stated it quite concisely in these words: "Concisely stated the argument was this: A suit for divorce a mensa et thoro by a guilty wife could not have been maintained; therefore no order for alimony pendente lite in such a suit could or would have been made; consequently no such order can be made under s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925, in a suit for divorce instituted by a wife who has been guilty of adultery." In my judgment the argument so concisely stated is almost obviously fallacious, and puts a limitation on the sub-section which the words of the sub-section do not in themselves bear, and which would have the effect of quite unduly crippling the power of the Court in the class of cases where divorce or nullity is permissible, but where judicial separation could not be granted. In the present case, as the learned President has said, the wife has a prima facie right to bring this suit. Her petition is a maintainable petition. It is not on the face of it bad. Although she may have committed adultery, nevertheless her conduct may be excused under the relevant sections of the Act, and she may therefore succeed in getting a divorce from her husband. That being so, there is no reason for saying that the power of the Court under sub-s. 3 to grant interim alimony is limited or is negatived by the fact of her having committed adultery.

That sums up concisely in my view the reasons why I think the learned President was quite right in considering that he had power in the present circumstances to grant the alimony now in question.

Then comes a second branch of the argument, or second ground for the appeal, a ground founded on the particular circumstances of the case, which refers to what is said to be the definite established practice of the Court under which interim alimony is never granted in cases where the wife is showing that she is capable of maintaining herself. Two or three cases were cited to that effect: *George* v. *George* (1) and *Burrows* v. *Burrows*. (2) To my mind those were decisions upon the particular facts of those cases. It is to be observed that in the latter case it was actually decided that the wife had sufficient means of support. In *George* v. *George* (1), the earlier of the two cases, it was even more obvious than in the latter case, that the wife had sufficient means of support. She was living with her son as his housekeeper. He was paying her, I think, the sum of 30*l*. a year. In the present case the wife has made a distinct statement that she is not capable of maintaining herself. She earns a little,

(1) L. R. 1 P. & M. 553.

(2) Ibid.

but she can only have one room, and she has two children to support.

It seems to me that in that state of things there was evidence on which the registrar might perfectly well have come to the conclusion that the wife had not sufficient independent means of support, and that it was proper that she should be granted a sum by way of interim alimony. The registrar fixed that sum at a very moderate rate. During six months it would only involve the respondent here in the payment of 13*l.*

So far as the second ground of appeal is concerned, I am sure that if that had been the only ground, leave to appeal would not have been granted. It seems to me that the first ground of appeal is the important one. The second ground of appeal is one that can be treated in a somewhat contemptuous fashion. I agree the appeal should be dismissed.

LAWRENCE L.J. I am of the same opinion. In my opinion the effect of s. 190, sub-s. 3, of the Judicature (Consolidation) Act, 1925, is not to confine the power of the Court to make interim orders to those cases in which the facts are such as would warrant the Court in making an order in proceedings for judicial separation, but to confer on the Court a general power to make interim orders of the same nature and class as could be made in properly instituted proceedings for judicial separation. If that be the true view, I agree with the learned President that the decisive inquiry in this case is whether the wife on the facts is a competent suitor for relief in a matrimonial cause, and that is not disputed.

On the second point I have nothing to add to what has already been said by my Lords. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for husband: *Mills, Lockyer, Church & Evill.*
Solicitors for wife: *Edmond O'Connor & Co.*

W. I. C.

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Jan. 31;
Feb. 4.

ADMIRALTY.

THE GOULANDRIS.

Shipping—Salvage—Lloyd's Standard Form of Agreement—"No cure no pay"—Maritime Lien—Seizure in Alexandrian Court—Saisie Conservatoire—Bankruptcy of Shipowner—Sale of Ship by Trustee in Bankruptcy in Egypt—Arbitration—Non-performance of salvage Award—Merger—Right to arrest Ship in England.

The plaintiffs, a firm of salvage contractors, rendered salvage services in the Bosphorus to the steamship *G.* under Lloyd's standard form of salvage agreement known as "No cure no pay." The agreement provided that pending completion of security the contractors should have a maritime lien on the property salved. The agreement was signed by the master on behalf of the owner of the ship and the owners of the cargo. The *G.* was taken to Constantinople where, no security being forthcoming, she was arrested in the Turkish Courts. She was, however, released on the terms that if she was allowed to sail to Alexandria she should be rearrested there, and accordingly an order was obtained by the plaintiffs for a "saisie conservatoire" of the ship on her arrival at Alexandria. After the arrest at Constantinople had been taken off the owner of the *G.* became bankrupt, and when the ship arrived at Alexandria she was seized by the trustee in bankruptcy. The plaintiffs proceeded to arbitration in London under the terms of the agreement and obtained an award against both ship and cargo, but the cargo owners only were represented at the arbitration. Shortly afterwards the trustee in bankruptcy, with the approval of the Mixed Tribunal of Commerce, sold the ship to the defendants and guaranteed that she was free of all charges on the part of creditors of the bankrupt owner. Under the Egyptian Code Civil Mixte there is no right in rem or maritime lien for salvage. The plaintiffs claimed in the bankruptcy proceedings the amount of the salvage award, but the trustee in bankruptcy took up the position that the master had no authority to sign the arbitration agreement and referred the claim to the Egyptian Court. When the ship came to this country the plaintiffs issued a writ in rem and the defendants gave an undertaking for bail to avoid the arrest of the ship and moved to set the writ aside:—

Held, (i.) that as the services were rendered under "no cure no pay" terms they gave rise to a maritime lien;

(ii.) that the sale under the authority of the Egyptian Court was not equivalent to a sale in an action in rem but was a sale cum onere;

(iii.) that the plaintiffs' rights were not merged in the unperformed award; and

(iv.) that as the claim in the bankruptcy proceedings afforded only a partial remedy, if any, and was entirely different from the relief obtainable in England, there was nothing inequitable or vexatious in allowing the plaintiffs to enforce their rights in rem against the ship in the present action.

MOTION by the defendants to set aside a writ in rem issued by the plaintiffs, the Ocean Towage and Salvage Company, against the owners of the steamship *Goulandris* in respect of salvage services. The facts are summarized in the headnote and are fully set out in the judgment.

Balloch for the defendants in support of the motion. The plaintiffs were employed by the late owner of the ship to render services under an agreement by which the remuneration was to be fixed by arbitration, and they never had a maritime lien: *The Solway Prince.* (1) The fact that Lloyd's standard form agreement provides that the contractors shall have a maritime lien on the property salved pending completion of security cannot bind the present defendants; the parties cannot agree that there shall be a maritime lien.

[BATESON J. It may be an accurate statement of the law.]

The plaintiffs chose to go to arbitration, to which the defendants were not parties, and an award was made and that is a bar to a subsequent action: Russell on Arbitration and Award, 11th ed., p. 492. The plaintiffs' rights have become merged in the award, which can be made a rule of Court and is equivalent to a judgment: Order XLII., r. 31A. In *The Sylph* (2)—a case not in the defendants' favour—under the agreement of reference the rights of the parties were preserved in case the award of the arbitrator should not be performed; there was no reservation in the present case and *The Sylph* (2), therefore, is distinguishable. The transfer of the ship to the defendants was equivalent to a sale in an action in rem; it was under the authority of a Court of competent jurisdiction and gave a clean title binding on all the world: see *Castrique* v. *Imrie.* (3) In *The Charles Amelia* (4), which appears to be against the defendants' contention on this point, privileged claims could not have been asserted, and the case therefore is distinguishable; it is also inconsistent with the decision in *Castrique* v. *Imrie.* (3) Salvage services do not give rights in rem under the Egyptian

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(1) [1896] P. 120.
(2) (1867) L. R. 2 A. & E. 24.
(3) (1870) L. R. 4 H. L. 414, 429.
(4) (1868) L. R. 2 A. & E. 330.

Code Civil Mixte, and the plaintiffs were content to take a "saisie conservatoire" at Alexandria; they in fact got security, for the proceeds of sale of the ship were paid into Court and the plaintiffs have a claim against them in the late owner's bankruptcy proceedings. The plaintiffs in effect are pursuing the res in two places at the same time, and the Court will not allow its process to be used when it would be vexatious or against equity to allow an action to continue: *The Christiansborg* (1); *The Golaa.* (2)

[Reference was also made to *The Africano* (3); *The James W. Elwell* (4); and Dicey's Conflict of Laws, 4th ed., pp. 469 and 799.]

C. R. Dunlop K.C. and *H. I. Stranger* for the plaintiffs. Whether or not the master had authority to sign the Lloyd's form of agreement—a question which may depend on the lex loci—when the plaintiffs rendered the salvage services on "no cure no pay" terms they acquired by the lex fori a maritime lien which the Admiralty Court has jurisdiction to enforce by an action in rem. It is immaterial whether the law of the flag or the law of the place where the services were rendered gives a maritime lien; it is only if the foreign law gives no remedy at all that the Courts of this country would decline to exercise jurisdiction: Dicey's Conflict of Laws, 4th ed., p. 799. *The Solway Prince* (5) is not in point, for the services in that case were not rendered on a "no cure no pay" basis and the plaintiffs were not volunteers. No security has been given and the lien has not been extinguished. Apart from laches or where the rights of a sovereign state might be impleaded (*The Tervaete* (6)) the lien could only be got rid of by a sale by a Court having jurisdiction in rem, which alone can give an absolute title free of lien: *Attorney-General* v. *Notstedt* (7); any other sale is cum onere. The sale by the trustee in bankruptcy did not, and by the Code de Commerce Maritime could not, give a clean title free of lien: see *The Charles Amelia* (1), which is not inconsistent with the decision in *Castrique* v. *Imrie* (2), for the Court in the latter case had jurisdiction to sell in rem. See also, as to the nature of a maritime lien, *The Bold Buccleugh* (3); *The Ripon City* (4); *The Jupiter* (5); Abbott's Merchant Shipping, 14th ed., p. 1012, and, in American law, Parson's Law of Shipping, vol. ii., ch. x., p. 340; and *The Brig Nestor*. (6) The plaintiffs' rights have not become merged in the arbitration award. Their rights could only be merged in the award if it had been performed: *Allen* v. *Milner* (7) and *The Sylph* (8), a case which is indistinguishable from the present. An unperformed award cannot have any greater effect than an unsatisfied judgment at common law—which is no bar to an action in rem: *The John and Mary* (9); *The Bengal*. (10) The plaintiffs have no security in Alexandria, they have merely the right to claim as creditors in the bankruptcy proceedings; the proceeds of the ship have become merged in the bankrupt's estate. Both the procedure and the remedy are different, and there is no ground therefore on which this Court should decline to exercise jurisdiction.

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(1) (1885) 10 P. D. 141.

(2) [1926] P. 103.

(3) [1894] P. 141.

(4) [1921] P. 351, 369.

(5) [1896] P. 120.

(6) [1922] P. 259.

(7) (1816) 3 Price, 97, 135.

[Reference was also made to *Cammell* v. *Sewell* (11); *The City of Mecca* (12); *The Wild Ranger* (13); *The Reinbeck* (14); and Daniell's Chancery Practice, 8th ed., p. 939.]

Balloch replied.

BATESON J. I cannot assent to this motion. The facts seem to be as follows: On November 26, 1925, a vessel, then called the *Carston* and now called the *Goulandris*, left Galatz on a voyage with cargo. On November 29 she grounded at a place called Lil Burnu, when services of a salvage character were rendered to her by a vessel belonging to the plaintiffs, the *Cleopatra III.*, a well known salvage vessel in those waters.

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(1) L. R. 2 A. & E. 330.
(2) L. R. 4 H. L. 414.
(3) (1851) 7 Moo. P. C. 267.
(4) [1897] P. 226.
(5) [1924] P. 236, 241.
(6) (1831) 1 Sumner, 71, 86.
(7) (1831) 2 Cr. & J. 47.
(8) L. R. 2 A. & E. 24.
(9) (1859) Swa. 471.
(10) (1859) Swa. 468.
(11) (1860) 5 H. & N. 728.
(12) (1881) 6 P. D. 106.
(13) (1863) Br. & Lush. 84.
(14) (1889) 6 Asp. M. L. C. 366.

The services were rendered on Lloyd's standard form of salvage agreement, "No cure no pay"; that is to say, it is a salvage contract, and provides for security being given by the owners of the ship and cargo. Clause 5 provides that "pending the completion of the security as aforesaid the contractor shall have a maritime lien on the property salved for his remuneration. . . . In the event of security not being provided as aforesaid or in the event of any attempt being made to remove the property salved contrary to this agreement, the contractor may take steps to enforce his aforesaid lien." That contract was signed by the master of the *Carston* on behalf of the owner of the ship and of the cargo, and by the master of the *Cleopatra* on behalf of the plaintiffs; under that contract salvage services were rendered, and those services, in my opinion—I will deal with the argument later—gave the plaintiffs who rendered them a maritime lien on the ship. They were salvage services rendered under a salvage contract.

On November 30 the vessel was refloated and taken to Constantinople. Negotiations then took place with regard to security, but that could not be satisfactorily arranged, and on December 7 the vessel was arrested in the Turkish Courts. Further negotiations followed. The owners of the cargo were anxious to get the cargo to Alexandria, and the owner of the ship no doubt was also anxious to get her away from Constantinople, because he was on the verge of bankruptcy. Accordingly the solicitors for the plaintiffs, the well known firm of Catzeflis & Lattey, managed to arrange for the arrest at Constantinople to be taken off, and for the ship to proceed with her cargo to Alexandria. The owners of the cargo were to give security, and the owner of the ship was to allow the vessel to be seized in Alexandria on what is known as a "saisie conservatoire"—having the same results as the arrest at Constantinople and protecting the plaintiffs for the amount of their maritime lien.

On December 24 the order for the attachment of the vessel was obtained from the Court at Alexandria, although she had not then arrived. She was released from the arrest at Constantinople on January 14 or 16, 1926, but was subsequently arrested by other creditors and did not get away till February. In the meantime, on January 27, the plaintiffs' solicitors in Alexandria wired to the plaintiffs: "*Carston* shipowner declared bankrupt and order to seize vessel here ineffective, as she passes into receiver's hands. If possible detain vessel Constantinople as question of privilege not certain here."

I think I am justified in assuming that that is an accurate statement of the facts; that at that date Mr. Paschalis, the owner, was declared bankrupt, and that his offer, which had been accepted, to give a similar security by arrest of the ship at Alexandria became quite ineffective. The result was that the arrangement which the plaintiffs had made to release the ship in Constantinople in exchange for a similar arrest in Alexandria came to nothing.

On February 18 the solicitors for the plaintiffs in England wrote to Messrs. Catzeflis & Lattey, in Alexandria: "Our clients were not able to re-arrest the ship before she left Constantinople. There is no doubt our clients have a maritime lien on the ship for salvage services, and they propose to exercise that lien irrespective of whatever hands the steamer may get into, unless in the meantime we are able to get security for the ship's proportion of the salvage. And it may be desirable to warn any buyer that that is the position, and you might also let the receiver know." As early as February, 1926, therefore, the position which the plaintiffs took and take up was made plain to the official in charge of the bankruptcy. If those instructions were carried out—and I have not the least doubt they would be—the position which the plaintiffs were going to take up had been definitely decided.

On February 21 the steamer arrived in Alexandria. Mr. Mathias states in his affidavit that Mr. Paschalis was only "declared bankrupt by definitive judgment" on March 22. Whether that was some formula that was finally concluded on March 22, though in fact he had gone bankrupt early in January, I do not know, but I do not think there is the least doubt that the bankruptcy began in January. On April 8 Mr. Mathias, who was the syndic, or, as we should call him, the trustee in bankruptcy, appointed to carry out the bankruptcy, made an application to the juge commissaire—what exactly his position is I am not sure, in some of the documents he is called "registrar"—asking for an order authorizing him to object to the salvage dispute being settled by arbitration. The attitude of the trustee in bankruptcy has always been that any arbitration under the "No cure no pay" agreement was null and void.

An arbitration, however, was held on August 26 before Mr. Dumas, a well known practitioner of great experience, and he made his award on that date. The award does not recite who was represented, but I am told by Mr. Dunlop that nobody appeared on behalf of the ship in that arbitration; only the owners of the cargo and the plaintiffs were present, and discussed the case there. The award is made by Mr. Dumas in these terms: "I find that salvage services were rendered by the contractors to the steamship *Carston* and her cargo, and I assess the amount payable to the contractors by the owners of the *Carston* at the sum of 1250*l.* and the amount payable to the contractors by the owners of the cargo of the *Carston* at the sum of 500*l.*; and I further award and direct that the owners of the cargo of the *Carston* do pay their own and the contractors' costs of the hearing before me," etc. The fact that the costs of the arbitration were confined to the cargo owners bears out the statement that there was nobody there on behalf of the ship.

On August 31, five days afterwards, there was a creditors' meeting, at which was discussed the sale of this vessel by the syndic, who had on August 24 asked the Court for permission to sell the ship. The documents do not say whether the plaintiffs were at that meeting or not. It does not appear anywhere in the proceedings that they were there. The creditors present agreed to a sale in accordance with the deed and formalities put before them. That sale was completed by documents on September 3, and finally allowed by the Court on September 13. It was a sale by the syndic, and was no doubt approved by the Court, but it was certainly not a sale after a judgment in rem. The trustee in bankruptcy had applied to the Court for permission to sell, and he got permission to sell; the ship was sold in accordance with the practice of the Court, and the sale was approved by the Court; but it was not a sale by the Court in the sense that it was a sale on a judgment in rem, which would be a sale of the thing as it stood, and not merely a sale of such interests as the parties to whom it belonged had in it. I cannot think there is any doubt about that. It was a sale such as any other trustee in bankruptcy would make—namely, a sale of the interest of the debtor, such as it was. In other words, it was a sale cum onere. When the terms of the contract are looked at I think that is made clear. Art. 1 states that: "Mr. Ferdinand Mathias, acting with the express consent of Mr. Ch. D. Paschalis, sells, cedes and makes over (the ship) to Messrs. Leonidas Dambassis and Antoine Diapoulis," and by art. 6 "the vendor, acting in his capacity as above, declares that as concerns the buyers the said vessel is free of all charges in general of whatever kind . . . . and guarantees the buyers that they will not have to submit to any proceedings on the part of Mr. Paschalis's creditors, undertaking, under penalty of the cancellation of the contract, to obtain the withdrawal of any seizure of the vessel." Art. 7 is: "Mr. F. Mathias, acting in his capacity as above, declares that the present sale is authorized by the juge commissaire (registrar) in the bankruptcy of Mr. Ch. D. Paschalis," in accordance with a decree dated August 25, 1926, and he states that the "sale is subject to the definite confirmation of the Mixed Tribunal of Commerce of Alexandria." As I understand it, that is a sale by the trustee in bankruptcy, guaranteeing that the buyers will not be subjected to any claims on the part of Mr. Paschalis's creditors, and if he fails to make that good no doubt he will be liable to the buyers for breach of his guarantee.

On October 18 the plaintiffs, being unable to enforce their rights except by action in the Courts of Alexandria, or to obtain security—they could put forward their claim, no

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doubt, in the bankruptcy and be met by the syndic saying that the arbitration contract was null and void—caught the ship in Hull and issued their writ, and claimed, as I think they were entitled to claim, a maritime lien on the property. It is that writ that the defendants are trying to set aside on the ground amongst others that they have bought the ship free of all incumbrances.

On October 19 it is said by Mr. Mathias that the Ocean Salvage Company, the plaintiffs, put in a claim in the bankruptcy for the salvage, and, as he states, that had been referred to the Court. On October 26 Messrs. Catzeflis & Lattey cabled to the plaintiffs saying: " *Carston.* Receiver disposed settle 500*l.* If you succeed seizing vessel and purchasers disposed furnish you bank's guarantee we recommend you insist payment subject decision English Court as arbitration submission attackable Egyptian Courts." If that is right, it seems that not only can the syndic say the arbitration is null and void, but he can say the whole agreement to arbitrate may be set aside, and there was some suggestion before me that a point could be taken, and would be taken, in the Egyptian Court that the master of the ship had no authority to bind the owner, and that the whole foundation of the " No cure no pay " agreement had gone. What the position may be in the Alexandrian Courts I do not know; I am not sufficiently informed about the matter; but at any rate it seems clear that the plaintiffs have no security of any sort in Alexandria. They have only the claim, which may or may not turn out to be good, against the proceeds of the bankrupt's estate in the hands of Mr. Mathias.

There is only one other matter to which I need refer. The warning which the plaintiffs had given to their solicitors in Alexandria to tell anybody that they were going to insist upon their maritime lien on this vessel was conveyed by them to these very defendants. Apparently the same solicitors acted for these defendants in Alexandria in connection with the sale, and they cabled on January 13, 1927, to the plaintiffs as follows: "*Carston/Goulandris.* On 13th September Dambassis and Diapoulis personally consulted us upon draft

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purchase contract and after informing them of possible seizures by creditors including Ocean Salvage they instructed us to attempt insert clause for indemnification by vendors in event of seizure. We drafted necessary clauses but same refused by vendors, and purchasers accepted vendors terms and contract duly executed and registered same day." It appears, therefore, that when the present defendants bought the ship they had full warning of the possible claim by the Ocean Salvage Company for their salvage services. They did not get the clauses which their advisers had drawn up for them inserted in the contract, but it looks as if they had something towards that in the terms of the guarantee to which I have already referred.

Mr. Balloch, for the defendants, took several points, which he says entitle him to have this writ set aside. The first point is that Lloyd's form of salvage contract ("No cure no pay") prevents the plaintiffs from bringing an action for salvage. It is contended that the case is governed by the decision in *The Solway Prince* (1), where the contract by the salving vessel made with the insurers of the salved vessel excluded the plaintiffs from any right to sue the ship herself when the insurers became bankrupt and failed to pay. I think the two cases are totally different. In *The Solway Prince* (1) there was a contract between the salvors and the insurers to do a particular work at a fixed price. The salvors therefore were not volunteers; it was not a "No cure no pay" contract, and inasmuch as they were not volunteers there could not be any salvage. In the present case the contract was a contract to salve "No cure no pay," with all the attending consequences, if salving services are performed, of there being a maritime lien on the property in favour of the salvors; and that maritime lien on the property has never been put an end to by any action of a competent Court or by any bargain which has been fulfilled between the parties.

Mr. Balloch argued that the contract was by the owner of the ship, and no one else, for remuneration in a mode specified.

(1) [1896] P. 120.

It is true that Lloyd's "No cure no pay" form is an agreement to go to arbitration and have the matter settled by an arbitrator out of Court; but it seems to me that the basis of the contract, by clause 1 and clause 5 together, is that the owner of the salved property shall provide security in the terms of the contract, and if he does not provide security then the contractor may take steps to enforce his lien through the Court. There is no other way of enforcing his lien. The truth is that the salvors have a right against the ship which can only be defeated if the whole of the salvage agreement, "No cure no pay," is carried out. I think the real answer to Mr. Balloch's point here is that the owners of the salved property, as far as the ship is concerned, never put up any security at all in accordance with the terms of the contract. They did not implement the bargain.

It was argued that the plaintiffs got the security for which they bargained, because they only bargained for a "saisie conservatoire," and that they got. I think perhaps they did get an order for a "saisie conservatoire," though they never actually got seizure. Certainly, in my view, what they bargained for was not a mere paper "saisie conservatoire," but an effective arrest of the property equal in value to the arrest in Constantinople, which would ensure their obtaining payment on any award that was made. I think the correspondence shows that they only released the ship in Constantinople on terms of arrest in Alexandria. I think "arrest" means arrest as we understand it—an effective arrest which will produce security.

Mr. Balloch argued that the security which the plaintiffs got was good security, because by means of the sale by the syndic the proceeds of the ship were put into Court and made available for any claim which they might have. I do not think that is the meaning of what was done or a carrying out of the intention of the parties. No doubt the property of the bankrupt went into a common fund, and the plaintiffs would have some rights against it, quite distinct, however, from their maritime lien—a partial remedy instead of a complete one.

The next point was that the award by Mr. Dumas was a binding award against the owners, or an award which could be made binding on them, and which could be made a rule of Court, and that in effect the rights of the salvors were merged in what is equivalent to a judgment. Mr. Balloch cited *The Sylph* (1) and, on the effect on a maritime lien of the sale of a ship in bankruptcy proceedings under French law, *The Charles Amelia*. (2) He admitted that both cases were against him, but he sought to distinguish them—on, as I thought, slight grounds. He tried to distinguish them on the ground that there was some reservation in each case. But I think Mr. Dunlop was right in saying that really they were on all-fours with this case, and conclude the matter. In *The Charles Amelia* (2) the master of the defendant's ship had given a bill of exchange, and had been allowed to go away with the ship. The ship came to England, and, although the bill of exchange had been given, it had not been paid, as the owner had become bankrupt; and it was held that the plaintiffs had not lost their lien for damage, either by laches or by the subsequent sale of the vessel by a French Court in the bankruptcy proceedings. *The Sylph* (1) was an action for personal injuries. The plaintiff went to arbitration and was awarded compensation. He was not paid, and he sued in Admiralty, and it was held that he was entitled to do so. The reservations in both cases I do not think amount to any more than would be implied in law if, on a bargain, one side failed to carry out or make good its part of the bargain. I think in this case the owner of the ship distinctly failed to make good his part of the bargain to give security for the plaintiffs' claim.

Mr. Balloch further contended that the award in itself was a good defence; but if the award is not performed—and so far from being performed it is contested in every possible way—it is no defence at all to an action in rem. It cannot be put higher than to say it is like a judgment that is unsatisfied. If a judgment at common law in personam were unsatisfied in respect of a claim for salvage, there would

(1) L. R. 2 A. & E. 24.

(2) L. R. 2 A. & E. 330.

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be no question that the plaintiffs could issue a writ and sue in this Court to enforce their maritime lien. I think that is clear from *The John and Mary* (1); *The Bengal* (2); and also *The Sylph.* (3)

The next contention was that the sale by the syndic under the authority of the Court in Egypt was as good as a sale in an action in rem. The action of the syndic, however, had nothing whatever to do with an action in rem, and the sale does not purport to be by the Court; it is a sale by the syndic with the approval of the Court. It transfers property no doubt, i.e., such interests in the property as the debtor may have had, but it does not purport to decide the rights in the property. It was also argued that according to *Castrique* v. *Imrie* (4) a sale by the Court in France is the same as a sale in rem. I do not think that is the right conclusion to be drawn from *Castrique* v. *Imrie.* (4) I think the decision in that case was that what had happened was the same as a sale in an action in rem. Here the facts are quite different, and I do not think the sale in this case has any resemblance to a sale in an action in rem.

Mr. Dunlop on the other side cited Abbott, 14th ed., pp. 1012 and 1013: " In the case of a judgment in personam " —and at most that is what this is, if it is anything at all because according to the evidence there is no proceeding in rem in the Egyptian Court—" the Court does nothing more than issue process against the property of the defendant, and if the officer of the Court should sell a particular chattel as being the defendant's property, there is nothing to prevent a third person impeaching such sale and setting up a claim to the chattel. All the Court does in such circumstances is to sell the defendant's interest, if any, in the particular chattel. In the case of a judgment in rem the Court directs that the res, and not the defendant's interest in the res, be sold. In other words, it determines on the disposition and status of the res. To this extent a judgment in rem binds third parties." So far as I know it is only a judgment in rem that does bind third parties.

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(1) Swa. 471.
(2) Swa. 468.
(3) L. R. 2 A. & E. 24.
(4) L. R. 4 H. L. 414.

Mr. Dunlop also referred to Parson's Law of Shipping, vol. ii., ch. x., p. 332; *The Nestor* (1); *The Bold Buccleugh* (2); and Daniell's Chancery Practice, 8th ed., p. 939—all much to the same effect. He also relied on the definition of a maritime lien laid down in *The Bold Buccleugh* (2); *The Ripon City* (3); and *The Tervaete* (4), which show that a maritime lien is something more than a mere right in rem. It is described in *The Bold Buccleugh* (2) as a kind of property; in *The Ripon City* (3) as a jus in re aliena; and in *The Tervaete* (4) as a subtraction from the interests of the owner. But whatever form of words is used, there is no question that it is something more than a mere right in rem, and I think Mr. Dunlop was right in saying that in order to get rid of it there must be a decision in an action in rem or something equivalent to it. Mr. Dunlop argued that the only other ways in which a maritime lien can be got rid of are by a sale to a sovereign state, when the question of impleading that sovereignty would arise, or by showing laches, and as far as I know he is right. *Castrique* v. *Imrie* (5) itself draws this distinction between a sale in rem and a judgment in personam.

In this connection the law of Egypt was referred to, and I had before me M. Duhamel, who gave me a great deal of assistance with regard to the law in France, and helped in the discussion of the Egyptian Code. I think that if a ship is sold by the Egyptian Court it must be sold in accordance with the Code de Commerce Maritime. As Mr. Dunlop said, there are only certain privileged claims—salvage not being among them—which are dealt with in the sales by the Court, and certain formalities must be carried out before they extinguish the privileged claims. Art. 5 sets out what are privileged claims. Art. 7 says how the privileges of creditors are extinguished by a sale; but, as that only refers to those privileged claims in art. 5, it has no relation to the extinction of a claim which does not come under art. 5. Salvage is not one of those, and therefore a salvage claim is not extinguished by such a sale. Under art. 4, therefore, the salvor has the right to follow the property notwithstanding that there has been a sale. If some right of salvage is to be found in the Egyptian Code, it must be under s. 729 of the Code Civil Mixte ; but, as M. Duhamel says, that is only a common law right—for work and labour done. It is quite a different right from salvage as we understand it. There is nowhere to be found in any of these codes any right in rem, or any maritime lien for salvage at all. Mr. Dunlop's points, therefore, are that this is not a sale by the Court at all, and if it is a sale at all it does not extinguish the salvor's lien.

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(1) 1 Sumner, 71, 86–7.

(2) 7 Moo. P. C. 267.

(3) [1897] P. 226.

(4) [1922] P. 259.

(5) L. R. 4 H. L. 414.

Lastly, Mr. Balloch contended that under the circumstances in this case, where the plaintiffs have the power of putting forward a claim against the proceeds of the bankrupt's estate in Alexandria, and where they have released the vessel in Constantinople and arranged for her rearrest in Alexandria, it would be inequitable after the sale to his clients that the plaintiffs should be allowed to follow the ship again here. I do not agree. As the plaintiffs have a maritime lien on the ship and find her here when they have been kept out—I will not use any other expression—of their security, and when they have not any means of getting their claim secured elsewhere, and find the ship in the hands of persons who must have known the danger and risk which they ran in purchasing such a vessel, I do not think there is any want of equity in saying that they must take the consequences. It is not a plea to jurisdiction ; it is a plea to the exercise of it. The remedy here, it seems to me, is quite different from the remedy available in Egypt, if any, and therefore the case does not come within cases like *The Christiansborg* (1), of lis alibi pendens, or double vexation of the defendant. There cannot be double vexation in a case of this sort, where there is a different defendant, if and when the defendant appears.

(1) 10 P. D. 141.

I have dealt with all the arguments as well as I can without reserving my judgment. In my opinion the motion fails and must be dismissed with costs.

Solicitors for the plaintiffs: *Downing, Middleton & Lewis.*
Solicitors for the defendants: *Wm. A. Crump & Son.*

E. C. M. T.

DIVORCE.

GILBEY *v.* GILBEY.

1926
Dec. 13.
1927
Jan. 17.

Divorce—Maintenance—Large Income of Husband—Principles to be applied in awarding Maintenance to Wife—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, *sub-ss.* 1, 2—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 2.

Although the considerations which applied in the Ecclesiastical Courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous, and disregards the duty imposed on the Court by s. 190, sub-ss. 1 and 2, of the Judicature (Consolidation) Act, 1925, under which the Court is to award by way of maintenance such sum as having regard to the wife's fortune, if any, to the ability of the husband, and to the conduct of the parties, the Court may deem reasonable. Where the husband's whole income has been expended on the requirements of the matrimonial home, a third of his means may well be required for the wife's maintenance; but where, beyond everything called for by such requirements, the husband possesses an ample fortune, the amount of his income affords no definite guidance as to the sum required to supply his sometime wife with the necessaries, comforts, and advantages incidental to her station in life.

Where the husband's gross income was 24,337*l.* a year, derived mainly from his interest in a business concern, the registrar by his report submitted that the husband should be ordered to secure to his wife, who had divorced him, by way of permanent maintenance for her life, the annual sum of 3500*l.* less tax, and to pay to his wife during their joint lives the further annual sum of 500*l.* less tax. The Court confirmed the report.

Kettlewell v. *Kettlewell* [1898] P. 138; *Hulton* v. *Hulton* [1916] P. 57; 33 Times L. R. 137 followed and applied.

MOTION to vary registrar's report as to maintenance.

The husband and wife were married on January 26, 1884. On July 1, 1912, they entered into a deed of separation by which the husband agreed to pay the annual sum of 1600*l.* to the wife during their joint lives, and it was provided that if the husband should predecease the wife his executors and administrators should during the remainder of her life, so long as she should continue his widow, pay to the wife the annual sum of 800*l.* The deed contained a provision that if the parties should be reconciled and return to cohabitation, or if their marriage should be dissolved or they should be judicially separated, the annuity to the wife should cease to be payable. On October 30, 1925, the wife presented a petition for divorce on the grounds of her husband's cruelty and adultery. These charges were established by the verdict of a jury, and on March 23, 1926, a decree nisi was pronounced. The decree nisi was made absolute on September 29, 1926. On April 9, 1926, the wife filed her petition for maintenance. The registrar by his report dated December 1, 1926, found that the husband's gross income was 24,337*l.* a year, derived mainly from his interest in a business concern. He submitted that the husband should be ordered to secure to the wife for her life the annual sum of 3500*l.* less tax, and that he should be ordered to pay to the wife during their joint lives or until further order the further annual sum of 500*l.* less tax. The wife moved for an order that the report should be varied by increasing the amount of secured permanent maintenance from 3500*l.* to 4500*l.* and that in other respects the report should be confirmed.

Bayford K.C. and *T. Bucknill* for the wife. The annual sum to be secured to the wife during her life should be 4500*l.*, making the total allotment of maintenance 5000*l.* a year less tax. The amount of maintenance to be allotted is not limited to 3000*l.* a year, as was at one time suggested: *Hulton* v. *Hulton.* (1) In *Sykes* v. *Sykes* (2) and *Kettlewell* v. *Kettlewell* (3) it was suggested that 3000*l.* a year would be an adequate jointure for the widow of a husband of great wealth, and therefore an adequate allotment of maintenance to a rich man's wife; but having regard to the increase in taxation and the decrease in the value of money, 5000*l.* now is worth less than 3000*l.* when those cases were decided. Unless one-third of the husband's income exceeds 5000*l.*, the Court should not depart from the general practice of allotting that proportion to the wife.

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(1) [1916] P. 57.

(2) [1897] P. 306.

(3) [1898] P. 138.

The Hon. Victor Russell for the husband. The increase of taxation and decrease of the value of money equally affects the amount of the husband's income. His gross income of 24,337*l.* is reduced by taxation to about 13,000*l.* a year. The wife when she entered into the deed of separation accepted an allowance of 1600*l.* a year.

[THE PRESIDENT. I have no information as to the husband's income at that time.]

It is not suggested that the provisions of the deed govern the decision of the Court after dissolution of the marriage, but they show the wife's accustomed mode of life and scale of maintenance before the divorce. The husband's income is derived from a business concern, and is of a fluctuating character. 4000*l.* a year, as suggested by the registrar, is an ample allowance for the wife, and the amount should not be increased.

Cur. adv. vult.

Jan. 17. THE PRESIDENT (LORD MERRIVALE) [after stating the facts and arguments set out above, continued:] It is always necessary to bear in mind in cases like the present, that the practice as to alimony which was observed in the Ecclesiastical Courts does not govern, as of course, the award of maintenance after dissolution of marriage. By the Matrimonial Causes Act, 1857, ss. 16, 17, and 22, the practice of the Ecclesiastical Courts must be duly regarded in awarding alimony after judicial separation and in some other cases, subject always to the judicial discretion of the Court. As to any permanent provision after dissolution of marriage, the rule applicable is that contained in the statutes which confer and control the power of the Court to award such maintenance, formerly the Matrimonial Causes Act, 1857, s. 32, and the Matrimonial Causes Act, 1907, s. 1, sub-s. 1, now re-enacted in s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. (1)

What is to be secured is such gross or annual sum as the Court shall deem reasonable having regard to the fortune, if any, of the wife, the means of the husband and the conduct of the parties; or the Court may order a monthly or weekly sum to be paid for the maintenance and support of the wife. It is no doubt true that the considerations of good sense and fairness which apply in fixing alimony must have due weight in determining the proper award of maintenance after a decree of divorce, but the assumption of a fixed arithmetical rule, and an indispensable process of applying that rule simpliciter, or in a form dependent for its modifications upon other arithmetical considerations, is erroneous, in that it disregards the nature of the duty imposed upon the Court by the statutes. In the discharge of this duty the Court is not bound by the practice of the Ecclesiastical Courts.

Where the husband's whole income has been expended on the requirements of the matrimonial home, a third of the husband's means may well be required for the wife's maintenance; but where, beyond everything called for by such requirements in the most comprehensive view, the husband possesses an ample fortune, of which he can dispose for external purposes, the amount of his income affords no definite guidance as to what sum is required for personal, domestic, and social expenses, and what sum will supply to his sometime wife the necessaries, comforts, and advantages incidental to her station in life. It is useful, too, to bear in mind, in distinguishing the award of permanent maintenance from the award of alimony in the Ecclesiastical Courts, that the latter was limited to the joint lives of the parties, and that under the express terms of the statutes permanent maintenance may be secured for the life of the petitioner, as it will be in this case. The annuity or periodical payment for life is obviously the better and more advantageous provision.

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(1) Sect. 190, sub-ss. 1 and 2, of the Judicature (Consolidation) Act, 1925, re-enacts s. 1, sub-ss. 1 and 2, of the Matrimonial Causes Act, 1907, and is as follows: "(1.) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable, and the Court may for that purpose order that it shall be referred to one of the conveyancing counsel of the Court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

(2.) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under sub-section (1.) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable. . . ."

The judgment of Lord St. Helier in *Kettlewell* v. *Kettlewell* (1), and the award of maintenance made in *Hulton* v. *Hulton* (2), illustrate the true view as to maintenance. Each case deals with a petitioner, where the divorced respondent was a man of large fortune, and in each what was deemed reasonable was so deemed not with regard to a notional rule granting to the petitioner a life interest in a defined proportion of her husband's fortune, but on the broader grounds indicated in the statute. In *Kettlewell* v. *Kettlewell* (1) the maintenance provided was at the rate of 3000*l.* a year against an income of 19,000*l.* In *Hulton* v. *Hulton* (2) it was 5000*l.* reducible to 3000*l.* on re-marriage, against an income estimated by the petitioner at 70,000*l.* and admitted to be 29,000*l.* A test was applied in *Kettlewell* v. *Kettlewell* (1), which had been suggested in the Court of Appeal in *Sykes* v. *Sykes* (3), which has often been found useful, and is useful here:—Would the proposed maintenance have been an adequate portion if the petitioner had become a widow of the respondent?

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(1) [1898] P. 138.

(2) [1916] P. 57; 33 Times L. R. 137.

(3) [1897] P. 306.

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The President.

I am satisfied that the submission of the registrar has been arrived at with proper regard to the law applicable and to the facts of this case, and, whether I regard it in the light of the decisions to which I have referred, or independently in order to form my own opinion of what is reasonable, I am satisfied of the adequacy of the maintenance proposed.

I accordingly confirm the report.

Solicitors for the wife: *Lewis & Lewis.*

Solicitors for the husband: *Baileys, Shaw & Gillett.*

C. M.

1927
Jan. 24;
Feb. 7;
March 7.

PROBATE.

In the Estate of POTTICARY.

Probate—Executor intermeddling—Misfeasance of Executor—Power to pass over Executor—Court of Probate Act, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 73.

The Court of Probate Act, s. 73, confers wide powers on the Court. Under it an executor not willing or competent to take probate may be replaced by an administrator to be appointed by the Court if it shall appear to be necessary or convenient by reason of special circumstances. Misfeasance on the part of an executor with regard to the estate of his testator is a ground for proceeding under the section even after the executor has intermeddled. Executors had intermeddled and neglected to prove the will. They had made an agreement with the universal legatee that the will should not be proved. In passing them over the Court ordered that a grant of administration should be made to a third person to be agreed upon by the executors and the legatee or in default to be appointed by the Court.

MOTION to pass over executors in making grant of administration.

The testator John Richard Potticary died on June 23, 1924. By his will dated February 6, 1916, he appointed as executors Walter Potticary and Ralph Turner. His widow Mary Ann Potticary was universal legatee. The executors neglected to prove the will but intermeddled with the estate. It was alleged by the widow that the executors had threatened to turn her out of a leasehold house forming

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part of the estate. On the other hand the executors set up an agreement with the widow that the executor W. Potticary should pay her an allowance and that the will should not be proved. The widow was eighty years of age. The executor W. Potticary in October, 1926, obtained her signature to a document which was in reality an authority to her solicitor to hand over documents, but which she, being unable to read, thought was an agreement that the allowance in question should be continued.

M. A. Potticary now moved for an injunction restraining the executors from intermeddling with the estate and also for a grant to her with the will annexed passing over the executors. The executors were now willing to take probate.

The application for an injunction was abandoned.

E. Bennett Calvert for M. A. Potticary. The executors have shown themselves unfit to act and can be passed over by reason of the general discretion bestowed on the Court by the Court of Probate Act, s. 73 : *In the Goods of Clayton* (1) ; *In the Goods of Ray.* (2)

H. Bensley Wells (*G. R. Blanco White* with him) for the executors. The statute only applies to the case in which the testator has appointed an executor not willing or competent to act or resident out of the Kingdom at the date of the death of the testator. The present case is on all fours with *In the Goods of Samson* (3), in which case it was expressly laid down that the statute did not apply to a case of alleged misconduct on the part of the executor. The case of *Clayton* (1) is distinguishable. The executor had renounced.

Cur. adv. vult.

March 7. HILL J. In this case it is said that under the Court of Probate Act, 1857, s. 73, the Court has not power to do what is asked. In my view that section gives the Court very wide powers, as appears from the cases of *In the Estate of Drawmer* (4) and *In the Goods of Ray.* (2)

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(1) (1886) 11 P. D. 76.

(2) (1926) 96 L. J. (P.) 37.

(3) (1873) L. R. 3 P. & M. 48.

(4) (1913) 108 L. T. 732.

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Hill J.

[His Lordship then dealt with the facts, and found that W. Potticary had misrepresented to the widow the effect of the document of October, 1926.] The executors have shown by their conduct in this case that they are not competent to carry out this executorship, and having regard to all the facts, I think there are special circumstances which entitle me to say that they must be passed over and that some other person must be appointed to administer the estate. But having regard to the age of the widow, who says she cannot read and who has at any rate put her signature to a document totally different to what she supposed it to be, I do not think it in her interest to appoint her, as I am asked. She would be the natural person, if I passed over the executors, because she is the sole beneficiary under the will. But I think that the parties ought to agree on some third person. If the Public Trustee can undertake the office, well and good. If they cannot agree, they must come back, and I shall make a grant of administration to some third person.

May 25. On the motion being again in the list and it appearing that the parties had been unable to agree as to an administrator, Hill J. appointed a nominee of the widow, and condemned the executors in the costs of the motion.

Solicitor for M. A. Potticary: *Geo. A. Godfrey.*

Solicitors for the executors: *Avery, Son & Fairbairn.*

R. M. M.

DIVORCE.

1927
April 4.

SCOLLICK *v.* SCOLLICK.

Divorce—Variation of Settlement—Power of Appointment to Children—Fresh Power of Appointment to Children of Second Marriage—Interest of existing Child—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5), *c.* 49, *s.* 192.

In varying a settlement the Court will exercise the wide powers conferred upon it by the Judicature Consolidation Act, 1925, s. 192, with regard to the facts of the case and the interests of children. If on the facts before the Court a child of a first marriage may gain advantages concurrently with the creation of a fresh power of appointment enabling children of a second marriage to share a settled fund with it, the Court will create that power, although it is not originally existent in the settlement and although its creation may eventually involve some pecuniary sacrifice on the part of the child of the first marriage.

Webster v. *Webster* [1926] P. 198 distinguished.

MOTION to confirm the registrar's report upon a petition for the variation of a marriage settlement.

A decree absolute for the dissolution of her marriage with Douglas A. Scollick was pronounced on May 3, 1926, on the petition of Mona Mary Scollick. By a marriage settlement executed on the marriage of the parties the trust fund, which was solely contributed by the wife, was settled upon trust, to pay the income to her for life without power of anticipation and after her death to the husband for his life (subject to certain limitations) and after the death of the survivor in trust as to the corpus of the fund for the children or remoter issue of the intended marriage, as the husband and wife should jointly, or the survivor of them, should appoint, and in default of appointment on certain conditions set out in the settlement. And the settlement further provided that in the event of there being no child of the intended marriage attaining twenty-one or, in the case of a daughter marrying under that age, the life interest of the husband should cease and the trust fund should be held as to one-third for the husband absolutely and as to the residue in trust for the wife absolutely and in the event of her predeceasing the husband in trust for the persons entitled in distribution had the wife died intestate and a spinster. And the settlement contained a power to the husband, if surviving, to appoint new trustees. There was one child of the marriage, a daughter Audrey Vincent Scollick, born May 20, 1918.

The trust fund was not yet in possession. It was estimated that the capital value of it would amount to 11,000*l.* or thereabouts, producing an annual income of 500*l.* On June 2, 1926, the petitioner married a second husband, Charles Bruton. The petitioner on May 5, 1926, presented a petition asking that all rights and powers of her first husband under the settlement should be extinguished as if he had died in the lifetime of the petitioner, that the words "intended or any subsequent marriage" should be substituted for the words "intended marriage" wherever the same occurred in the trusts of the settlement for children or remoter issue and that a proviso should be added that in no case, whether under or in default of appointment, should a child or children of a subsequent marriage take a larger share of the fund than Audrey Vincent. The first husband did not appear to the petition for variation. The registrar reported on the petition that the second husband of the petitioner had filed an affidavit undertaking that if the petitioner was allowed, as was the effect of her prayer, to appoint out of her trust fund to any children born of his marriage with her, he would provide out of his own resources for Audrey Vincent an education befitting her station in life, until the age of sixteen, if he should so long live and until the death of the survivor of the parents of the petitioner. It was further reported that the petitioner had no means of her own, that the respondent was not in a position to contribute to the maintenance and education of Audrey Vincent and that the second husband of the petitioner was at present paying the school fees of the child. The registrar submitted that the rights and powers of the first husband should be extinguished as asked. He submitted that having regard to *Webster* v. *Webster* (1), it was doubtful whether the Court would make any further alteration of the

(1) [1926] P. 198.

settlement, but that if the Court should consider that there was jurisdiction to add to a settlement a fresh power of appointment to children of a second marriage, the present case was a fit one for the exercise of it. The registrar further submitted that in that event the words "intended or any subsequent marriage" should be substituted for "intended marriage" with the insertion of a proviso that in no case whether under appointment or in default of appointment should the children of any subsequent marriage or the issue of such children take in the aggregate a larger share of the fund than the child of the petitioner and her first husband and the issue of that child, that a hotchpot clause in the settlement should be consequently amended and that the undertaking of the second husband should form part of the order. The petitioner consented to the interest of Audrey Vincent under the settlement being converted into a vested one subject to the creation of the fresh power of appointment.

Acton Pile in support of the motion. If a settlement contains a power to appoint to the children of a second marriage, there is authority for the acceleration of that power in the case of the first marriage being dissolved: *Whitton* v. *Whitton* (1); *Hodgson Roberts* v. *Hodgson Roberts*. (2) The words of the statute are very general, and the Court has power to exercise its discretion in applying the settled property for the benefit of the children of the marriage or their parents: *Hartopp* v. *Hartopp*. (3) In *Blood* v. *Blood* (4) Gorell Barnes J. insisted on the wide words of the statute, and said, "To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse, that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case. I, therefore, do not desire to see any narrow interpretation placed upon the

(1) [1901] P. 348.
(2) [1906] P. 142.
(3) [1899] P. 65.
(4) [1902] P. 78.

words of the section." If it is desirable to give the petitioner power to appoint property to the children of a second marriage upon the terms proposed, the action of the Court should not be restricted solely to the case where there is present an express provision to that effect in the settlement before it. In the recent decision in *Webster* v. *Webster* (1) on this precise point, the Court expressly refrained from deciding that there was no power to do what is now asked, although it did not see its way to do it on the facts of the case then before it.

G. O. Slade (*W. G. Earengey* with him) for the infant Audrey Vincent Scollick supported the motion. If the interest of the child under the settlement is converted into a vested one, as proposed, the child will get three benefits by the proposed order. These are, a vested interest, an accelerated interest owing to the extinction of that of her father, and the provision of an education.

HILL J. In this case the registrar has made an alternative recommendation. What he would like to see done is in the second part of his recommendation, but he doubts whether he could recommend such a course because of the decision in *Webster* v. *Webster*. (1) If I cannot make an order such as he would like to recommend, then he proposes in the alternative the ordinary and simple course of extinguishing all the rights, powers and interests of the respondent in the wife's fund, as though he was dead.

I have had before me counsel for the wife and counsel for the child. There is only one child of the marriage, a girl of nine years of age. They have both presented to me able arguments, and they are both—counsel for the wife no less than counsel for the child—convinced that it will be in the interests of the child that the Court should make an order as recommended and preferred by the registrar. Now that they have stated the facts for consideration I am entirely in agreement with them. One of the alternatives presented is that the child's interests under the settlement should be

(1) [1926] P. 198.

preserved exactly as they are, and in that case the respondent's interest in the fund, which is at present only a reversionary interest, having been extinguished, when this fund falls in, the wife would have a life interest and it would pass to this one child, subject to this, that there is a power oi appointment to children or remoter issue. So that the wife would have it in her power, if she chose to overlook her child, to appoint to its children. That is a very unlikely contingency, but, at any rate, subject to that contingency, the child would ultimately on the death of the mother come into this fund. The other alternative is this. The mother has married again, and she says: "I may have other children by my second husband. I should like a power to appoint part of my fund to them," and the new husband says: "I am anxious for the welfare and education of the child we are considering, and if my wife has some power of appointing from her fund to children which she bears to me, I am ready to be generous in the upbringing of the child in question. If, on the other hand, the whole of the wife's fund is to pass to this child, I shall have to consider saving money for any children of my present marriage." That all sounds very reasonable and what a man will be likely to say. Those are the two alternatives. I am in this position. It would seem to me to be greatly in the interests of the child that some such arrangement, as is so foreshadowed, should be carried out. It must always be in the interest of a child, if she has half-brothers and half-sisters, that she should not be in some superior position in her expectations to them. I do not think that that is an important consideration. But unless there is some pecuniary interest I do not think I ought to interfere on that ground taken by itself. Here it must be very much to the benefit of the child that while she is growing up she should be secured with proper maintenance and good education, even at the sacrifice of some portion of a fund, which may in fact not come actually into her possession for many years. That being so, I think it would be pedantic to pay too close a consideration to the question whether the original settlement contemplated a power of appointment such as is now proposed

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to be introduced. The case is unlike *Webster* v. *Webster* (1), because in that case, apart from what has been spoken of as the sentimental side of the question, the proposed alternative would have been all money lost to the child. It was difficult to see any real quid pro quo of any sort in that case. I doubted in *Webster* v. *Webster* (1) whether the Court had power in making a variation to insert a power to appoint to children of a subsequent marriage, when nothing of the kind is contemplated by the settlement. At the same time I then felt very fully the force of the words of Gorell Barnes J. in *Hartopp* v. *Hartopp*. (2) I was careful not to definitely decide the point, but to decide the case on the facts of that case, and I am going to decide this case on the facts of this case.

Counsel for the child having been so fully satisfied that the change proposed is in the interest of the child, I shall confirm the report. The effect will be that the mother will have power to appoint a moiety of the fund in favour of her children by her second marriage, and the further changes necessary to give effect to that will be carried out, including the conversion of the interest of the child of the first marriage into a vested one.

Solicitors for the petitioner and the child: *Webster & Webster.*

(1) [1926] P. 198. (2) [1899] P. 65.

R. M. M.

DIVORCE.

1927
March 14, 28; *April* 8.

TALLACK *v.* TALLACK AND BROEKEMA.

Divorce—Domicil—Jurisdiction—Settlement of Property of guilty Wife—Wife and her Property beyond the Reach of Jurisdiction—Effectiveness of Judgment—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 42, 45 *—Matrimonial Causes Act,* 1860 (23 *&* 24 *Vict. c.* 144), *ss.* 6, 7*—Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 191, *sub-s.* 1*—Divorce Rules* 15, 16, 71 *and* 72.

The jurisdiction in divorce is limited to England and Wales and depends upon domicil there. It does not necessarily confer any authority over the property of a person domiciled in a foreign country. The property of a guilty wife, amenable, under the Judicature Consolidation Act, 1925, s. 191, to the jurisdiction to order a settlement of it, is prima facie the property of a woman who is domiciled in England and therefore subject to English jurisdiction. That jurisdiction can be invoked against a person not domiciled in England, and in respect of property beyond the jurisdiction, only subject to the principle that English Courts will not infringe the authority of foreign tribunals in their domestic affairs or adjudicate with regard to property when their judgment will be ineffective. Apart from jurisdiction over property, the exercise of jurisdiction in personam in such a case depends upon the question whether the party to be affected by it is within the reach of the compulsory process of the Court.

The provisions of the Matrimonial Causes Act, 1857, s. 42, for service out of the jurisdiction apply to the service of the petition in a suit and not to proceedings for a settlement. Divorce Rules 15 and 16 as to appearance apply to appearance in a suit, as the context shows. The practice with reference to appearance to a petition for a settlement is governed by rr. 71 and 72, and an appearance under these rules, qualified during the proceedings upon it, by denial of the existence of jurisdiction, is not to be regarded as a submission to that jurisdiction.

Motion to confirm the report of the registrar upon a petition by a husband petitioner in a suit for dissolution of marriage for a settlement of the property of the respondent wife under the Judicature (Consolidation) Act, 1925, s. 191, sub-s. 1.

The decree nisi was pronounced on October 17, 1924. The respondent, out of her separate estate, and the co-respondent were respectively condemned in costs and the co-respondent ordered to pay 1000*l.* as damages. Custody was given to the petitioner of the two children of the marriage, a girl then eight and a boy then five years old. Neither of the respondents defended the suit. The amount of the damages was in due course lodged in Court, being found by the respondent, as the co-respondent was without means. The decree was made absolute on July 27, 1925, and on August 20, 1925, the respondent and the co-respondent, who was Dutch, were married in Holland and the respondent acquired a Dutch domicil. In contemplation of this marriage articles were executed dealing with property of the respondent. On June 21, 1926, Hill J. made an order on a summons giving the petitioner leave to file, out of time, a petition for the settlement upon the children of the property of the respondent. The summons also asked for payment out to the petitioner of the amount of the damages in Court, and this part of the summons stood over generally. Previously to this order on summons the respondent had obtained leave to appear, the appearance being limited to the application of the amount of the damages and a question of access to the children. After various interlocutory proceedings the registrar reported upon the petition for a settlement that the gross income of the petitioner was about 515*l.* per annum, of which 475*l.* was earned, and that the maintenance and education of his children cost him 300*l.* per annum, and that the property of the respondent, consisting of foreign and mainly Dutch investments, was of the approximate value of 9000*l.* yielding 500*l.* per annum, and that the co-respondent had no means. The report also stated that on the proceedings before the registrar counsel for the respondent had protested against jurisdiction to order a settlement. The registrar submitted that the damages should be paid out to the petitioner and that the respondent should be ordered to settle 100*l.* per annum upon each child for life, and that out of this annual income there should be paid certain premiums upon education policies for the children, hitherto paid by the respondent, and that the respondent should pay the costs of the proceedings out of her separate estate. The petitioner now moved to confirm this report with the variation, as regarded the proposed settlement, that the respondent be ordered to lodge in Court within twenty-one days the sum of 4000*l.*, one half of this sum to be settled on each child.

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TALLACK *v.* TALLACK AND BROEKEMA.

R. Ritson for the petitioner. The Court has jurisdiction under the Judicature Consolidation Act, 1895, s. 191. There is power to deal with capital: *Lorriman* v. *Lorriman* (1); *Noel* v. *Noel* (2); *March* v. *March*. (3)

[Lord Merrivale referred to *Ponsonby* v. *Ponsonby*. (4)]

In estimating the capability of the respondent to make a settlement, the money already furnished by her in discharge of the damages should be reckoned as part of her fortune: *Noel* v. *Noel*.

D. Cotes Preedy K.C. (*C. C. Trotter* with him) for the respondent. *Noel* v. *Noel* (2) is distinguishable. That case dealt with a subsisting settlement. It is not disputed that the 1000*l.* should be invested and applied for the benefit of the children, but the order should be limited to that sum; the further provision recommended by the report is excessive. There is no authority for the payment into Court of a lump sum, and this objection is a fortiori in the absence of evidence that there is property within the jurisdiction to be subject to an order. By the law of the acquired Dutch domicil of the respondent no order of this Court can be enforced against her property.

[The evidence was then tendered of Dr. Bisschop—a member of the Amsterdam and English Bars—to the following effect. Under the Dutch Civil Code execution of foreign judgments cannot be had in Holland except in special cases. They are not prima facie recognized in Holland as res judicatæ, and proceedings to obtain fruition of them except in special cases must be instituted de novo in the local Court. A Dutch subject who brings an action in England and fails on the merits will be precluded from suing again in Holland on the same cause of action. Moreover, notwithstanding appearance and defence in England by a Dutch subject and judgment against him here, certain Dutch tribunals have held themselves bound to refuse to enforce that judgment and to leave the plaintiff, if he so desires, to proceed de novo in Holland to enforce his claim.

(1) [1908] P. 282, 291.

(2) (1885) 10 P. D. 179.

(3) (1867) L. R. 1 P. & M. 440.

(4) (1884) 9 P. D. 58, 122.

As regards settlement of property between spouses and disputes between them as to their obligations towards their children no jurisdiction exists in Holland corresponding to that sought to be invoked in the present case. The "Guardianship Councils" which are appointed by the State in each province, to deal with such questions, have power merely to direct periodical payments for the maintenance of children.]

The petition for a settlement was subsequent to the second marriage of the respondent, and the marriage articles on that marriage have caught up all the property of the respondent, and there are no available assets to abide an order of this Court.

Ritson in reply. The order asked for is a personal order which the petitioner is entitled to, even if he has to resort to Holland to enforce it. If the respondent desired to dispute jurisdiction, she should have appeared under protest.

[LORD MERRIVALE P. It is still to be decided that appearance and argument invalidate an objection to jurisdiction.]

Cur. adv. vult.

April 8. THE PRESIDENT (LORD MERRIVALE). The matters in question in this case arise under the power which was granted to the Court by the Matrimonial Causes Act, 1857, s. 45, and the Matrimonial Causes Act, 1860, s. 6, to order a settlement of property of a wife, divorced for adultery, for the benefit of her husband or children. The sections in question are now embodied in the Judicature (Consolidation) Act, 1925. Questions of difficulty arise which are not provided for in terms in the statutes, and as to which there is no authority of decided cases.

The parties are divorced spouses, who were married in 1912. The husband's domicil of origin was English; that of the wife Dutch. During their married life they had their domicil in England and lived here. The wife had been born in Holland. In October, 1924, at the suit of the husband she was found to have committed adultery with Gerard

Willem Broekema, a Dutchman, who was co-respondent in the suit. A decree nisi was pronounced and damages to the amount of 1000*l.* were assessed against Broekema. In July, 1925, the decree nisi was made absolute, and in August, 1925, the respondent and the co-respondent were married. They took up their residence in Holland, and they have ever since been domiciled in Holland. Pending the divorce suit 1000*l.* was paid into Court under the order as to damages made against the co-respondent at the hearing. This sum was provided by the respondent. The co-respondent was and is without means. The respondent had in 1912 investments of the value, as is said, of about 12,000*l.* She has at present, as has been found upon inquiry in the registry, investments of a capital value of about 9000*l.*, which yield an income of about 500*l.* a year.

The present controversy between the parties has come about under circumstances which I will state. In April, 1926, some months after the dissolution of the marriage of 1912, the petitioner in the usual way issued a summons for directions as to the disposal of the money paid into Court in respect of damages. Without such an application this sum could not be appropriated. This money had been in Court since November, 1924. In March, 1926, the respondent had applied by summons for liberty to enter an appearance in the suit, notwithstanding decree absolute, "so that she might be heard on the question of payment out of Court of the damages and on the question of access to the children of the marriage." Leave to enter an appearance so limited had been granted. Each party filed evidence. The respondent alleged that the 1000*l.* in Court had been provided by her and paid into Court under an arrangement that the sum should be settled on the children of the marriage. This the petitioner and his solicitors denied. The summons came to a hearing, and the petitioner then applied for and obtained leave to file a petition asking that the respondent "do make a settlement on each of the children of the marriage" and that the summons should stand over generally. A petition was in due course filed, the material allegations in which were that there were two children of the marriage, that the respondent was "possessed of stocks, shares and other property of her own exceeding 12,000*l.* in value, from which she derived an annual income of 600*l.*," and that the petitioner's income was about 500*l.* a year. No mention was made of the re-marriage of the respondent or of her domicil. To this petition so filed the respondent in September, 1926, by the solicitors who had acted for her in the previous proceedings, entered an appearance. The appearance, so voluntarily entered, is relied upon by the petitioner as a submission by the respondent to the decision by the Court of claims of considerable variety made by the petitioner against the respondent in personam and in respect of her property. Stress is laid upon the fact of an unconditional appearance for reasons based on Matrimonial Causes Rules 15 and 16; these, however, apply, as the context shows, to appearance in a suit. The rules as to petitions like the present are rr. 71 and 72.

The answer of the respondent to this petition for settlement was duly sworn and filed, and, after setting out the state of her means, the terms of a settlement made by her upon her re-marriage and the existence of insurance policies obtained at her cost by way of help toward the education of the children, it concludes by asking that the 1000*l.* in Court shall be settled upon them. When the matters raised by the petition and answer came in the usual course before a registrar for inquiry and report, counsel appeared for the respondent and objected that the Court had not jurisdiction to order a settlement of her property, she being domiciled in Holland and having property only in Holland, and, as is set forth in the report of the learned registrar, counsel "stated that he appeared to the petition for settlement under protest as to the jurisdiction of the English Court to order a settlement of the wife's property."

The report of the registrar submits that (1.) the 1000*l.* in Court should be paid out to the petitioner; (2.) the respondent should be ordered to settle the sum of 100*l.* per annum upon each of the children of the marriage for life, and that out of such sums the premiums upon the educational policies be paid; and (3.) the respondent should pay the costs of the proceedings out of her separate estate.

Upon becoming aware of the terms of the registrar's report the petitioner gave notice of a motion for (*a*) an order in terms of the submission in the report as to the disposal of the 1000*l.* in Court; (*b*) in lieu of the submitted order for a settlement, an order upon the respondent to lodge in Court within twenty-one days a sum of 4000*l.*; and (*c*) an order upon the respondent to settle upon each of the children of the marriage the sum of 2000*l.* out of this named sum of 4000*l.* with directions for disposal of the income. The petition to which the respondent appeared does not contain claims (*b*) and (*c*).

At the hearing of the motion counsel appeared for the petitioner to support his new application. Counsel appeared for the respondent to protest against any assertion of jurisdiction over the respondent's property in Holland, and to resist the application for payment out of the 1000*l.* in Court. On the respondent's behalf evidence of Dutch law was given in explanation of the effect of marriage in Holland upon property possessed by either spouse at the time of marriage, and as to a jurisdiction existent in Holland under which orders could be made against parents in respect of the maintenance of children, special local committees called "Guardianship Councils" being entrusted with this authority. Information was given on both sides as to the details and whereabouts of the respondent's property. Under the Dutch Code of Civil Procedure execution may not be had in Holland under foreign judgments except in cases expressly provided for by Netherlands law. Proceedings in other than the excepted cases must be taken anew before one of the local Courts. No suggestion was made before me that the present case falls within any statutory exceptions. It was shown, however, that under Dutch law a citizen of the Netherlands who brings an action in England and fails on the merits will be precluded from suing again in Holland in respect of the same alleged cause of action. It was also shown that notwithstanding appearance and defence in an action brought in England against a Dutch citizen and judgment against him at the hearing, certain Netherlands tribunals have held themselves bound to refuse to enforce the judgment as such and to leave the plaintiff, if he so desires, to proceed de novo in Holland to enforce his claim. As regards settlement of property between spouses and disputes between parents as to their obligations towards their children, the evidence was that no jurisdiction such as that invoked in the present case exists in Holland, and that the "Guardianship Councils" which are appointed by the State in each province to deal with such questions have power only to direct periodical payments for the maintenance of children.

The evidence given on the respondent's behalf satisfies me that as between Dutch spouses, whether during marriage or after divorce, no orders as to property such as are here sought by the petitioner could be made by any Court in the Netherlands, and that no judge or Court there would or could under the Civil Code give effect in Holland to an order made here in terms of the petitioner's application. No evidence was given of the existence in England of any property of the respondent in respect of which an order of this Court could be enforced. In replying upon the argument on behalf of the respondent counsel for the petitioner accepted the conclusion that no such property exists, and so far as regards the petitioner's claim for a settlement he relied upon a contention that the respondent had voluntarily submitted to the jurisdiction of the Court by her entry of an unconditional appearance to the petition, and that in a proceeding in personam such a submission binds the party to the acceptance of the eventual judgment of the Court.

The dispute which has arisen between the parties as to the sum of 1000*l*. paid into Court under the decree for damages has been inconveniently, and perhaps not without intent, linked up by the petitioner's advisers for discussion and decision along with the question of settlement. I will dispose of it now.

In view of the petitioner's evidence, the findings of fact in the report, and the situation of the children of the marriage, the proper order to be made is that proposed by the registrar for payment out of the 1000*l.* in question to the petitioner.

The remaining questions upon the petitioner's motion depend upon the meaning and effect of the Judicature (Consolidation) Act, 1925, s. 191, sub-s. 1, construed as part of the English law of divorce. To what extent can an English Court consistently with the general principles of international law which govern national jurisdictions—apart from submission by a defendant—exercise jurisdiction in personam over a defendant domiciled abroad so as to bind him or her by its decree, or to establish a charge upon his or her property or alter his or her proprietary rights in property outside the jurisdiction? Does the appearance as defendant of a foreign subject before the Court for the purpose of disputing the jurisdiction empower the Court to adjudicate upon claims against the defendant so as to bind him by a judgment in personam? Is the claim of the petitioner here a claim in an action in personam? If the Court has and ought to exercise jurisdiction in personam in such a case, can it and ought it to assume power to alter the property in the defendant's assets not within its jurisdiction?

The relevant sections of the statutes are the first matter for consideration. Their effect is perhaps somewhat misunderstood. It is probably correct to say that s. 45 of the Matrimonial Causes Act of 1857 neither created a cause of action nor set up a new right in equity. In 1857 and long afterwards a delinquent wife so long as she was covert could not sue or be sued. Nor was any equitable tribunal empowered to treat her matrimonial offence as founding any pecuniary demand or interest in her property. The power given to the Court in Divorce to redistribute settled property of a wife because of a matrimonial offence was absolutely new. The jurisdiction was statutory and had no precedent in the Ecclesiastical Courts. It was anomalous, in that nothing like it had existed at common law or in equity. In some respects it was penal. One of the difficulties in the present case could not arise under the Act of 1857, because the respondent, being a domiciled Englishwoman by reason of her marriage, was manifestly subject to the jurisdiction of the Court until after decree of dissolution of marriage. A decree of dissolution was formerly and under the Act of 1857 made upon the hearing of the petition. The decree nisi was introduced by the Act of 1860. The jurisdiction as to property remained a jurisdiction to be exercised when the decree absolute was made, but the intervening period was available for any interlocutory proceedings which might be sanctioned. One unforeseen difficulty under the Act of 1857 had to be provided against and was provided against under the Act of 1860 by an enactment—namely, s. 6—that notwithstanding any new coverture a divorced woman's indenture, as to her property, if made pursuant to an order of the Court, should be deemed valid and effectual. Bearing in mind that the jurisdiction in divorce is a jurisdiction limited to England and Wales and dependent on domicil, it cannot, I think, be said that the statutory authority invoked by the petitioner is, on the face of it, necessarily an authority which extends to a woman, whether feme sole or feme covert, who is not in fact domiciled here. It is perhaps not immaterial on the question of construction that the power which was conferred on the Court by statute for service of process out of the jurisdiction (Matrimonial Causes Act, 1857, s. 42) is a power in relation to the petition in a suit and not to a proceeding such as is under consideration here.

As to the property of a guilty wife, which is subjected by the statute in question to the jurisdiction of the Court, it is sufficient to say generally that prima facie what is dealt with is property of a woman domiciled in England subject by reason of her domicil to the jurisdiction of English tribunals.

Apart from any submission by the respondent to the jurisdiction sought to be invoked, and in the absence of any express statutory provision which directs the exercise of the jurisdiction over a respondent not domiciled in England, or in respect of property beyond the jurisdiction, the power of the Court to do that which is prayed by the petitioner

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depends upon general principles, based in part at least on the comity of civilized States. Mr. Albert Dicey in his work The Conflict of Laws, 4th ed., pp. 27, 33, states two applicable principles in these words: "General Principle No. II.: English Courts will not enforce a right otherwise duly acquired under the law of a foreign country. . . . (*c*) Where the enforcement of such right involves interference with the authority of a foreign state, within the limits of its territory." Principle No. III.: "The Courts of any country have jurisdiction over (i.e., have a right to adjudicate upon) any matter with regard to which they can give an effective judgment and have no jurisdiction over (i.e., have no right to adjudicate upon) any matter with regard to which they cannot give an effective judgment." Applying the first of the tests stated by Mr. Albert Dicey, it seems to me clear that the property in Holland of the respondent, a married woman and domiciled in Holland, cannot be partitioned by an English Court without infringing the authority of the Netherlands law over the domestic affairs of families domiciled in Holland. To apply the second test formulated by Mr. Albert Dicey, this question must be answered: Can this Court give an effective judgment as to the respondent's property so as to bind the property? It is not clear that the judicial tribunals of the Netherlands are able to give effect at all to judgments of foreign Courts even in personal actions against defendants living in Holland. But having regard to the terms of the Civil Code, and the evidence of Dr. Bisschop, I am satisfied that a decree of this Court purporting to partition the property of the respondent would be an idle and wholly ineffectual process.

Reference may perhaps be usefully made on this part of the matter to the case of *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote.* (1)

The application of the petitioner for an order for a payment into Court was used as the basis of an argument that even if a decree here for a settlement of the respondent's property would be ineffectual in Holland, an order upon her

(1) [1894] A. C. 670.

for payment into Court of a sum of money with a view to an order later for a settlement would come within the description of a judgment in personam, and ought therefore to be made. The respondent, it was said, has appeared, and is subject to a personal judgment; and such a judgment should be granted ex debito justitiæ, even though she may not obey it and no execution upon it may be obtainable. This contention fails on various grounds. The prayer of the petition as filed set forth no cause of action which would found an action in personam properly so called: *Municipal Council of Sydney* v. *Bull.* (1) The respondent's appearance to the petition was not an appearance to meet the present claim. I am not persuaded that an appearance to such a petition as the present, qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied. I am satisfied that the proposed interlocutory order would not be enforced in Holland. I was referred by way of authority to cases in this Court where jurisdiction undoubtedly existed: *March* v. *March* (2); *Ponsonby* v. *Ponsonby* (3); *Noel* v. *Noel* (4); and *Lorriman* v. *Lorriman.* (5) Such cases throw no light on the question really at issue. There is some guidance perhaps in some old authorities where with regard to disputed jurisdiction the principle was discussed before the existing rules as to jurisdiction were formulated. In *Carteret* v. *Petty* (6) a defendant resident in Ireland, who appeared before the Court of Chancery and demurred to the jurisdiction, was ordered to answer a bill for an account for waste committed in Ireland, because "wheresoever the defendant may, by personal coercion, be compelled to perform the act decreed, there after answer put in, the Court shall proceed to a decree." In *Foster* v. *Vassall* (7) the same ground is stated in respect of suits in equity, as to matters

(1) [1909] 1 K. B. 7.

(2) L. R. 1 P. & M. 440.

(3) 9 P. D. 58, 122.

(4) 10 P. D. 179.

(5) [1908] P. 282, 291.

(6) (1675–6) sub nom. *Kennedy* v. *Cassillis* (*Earl of*) 2 Swanst. 313, n.p. 323, per Ld. Nottingham L.C.

(7) (1747) 3 Atk. 586, 589, per Ld. Hardwicke L.C.

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outside the jurisdiction, in these words: "as the defendant is here, the Courts do agere [*sic*] in personam, and may, by compulsion on the person, and process of the Court, compel him to do justice." Lord Mansfield, in *Mostyn* v. *Fabrigas* (1), drawing the distinction as regards presence and absence of jurisdiction, and contrasting actions for personal wrongs and actions in respect of property abroad—in that case realty—used these words: "The substantial distinction is, where the proceeding is in rem, and where the effect of the judgment cannot be had, if it"—that is the proceeding—"is laid in a wrong place." The compulsory process referred to in the Chancery cases is not available here at the instance of the petitioner. The respondent is beyond its reach. Nor has she appeared in a suit so framed, with regard to a personal cause of action, that after judgment attachment would be the penalty of default of obedience. I may add this: I have purposely refrained from consideration of the proper order for settlement, if such an order could properly be made.

It was ultimately urged on the petitioner's behalf that ex debito justitiæ some order ought to be made on the prayer of the motion with its amended claim, so as to enable the petitioner to take proceedings at his own risk in Holland, and alternatively it was submitted that no final judgment adverse to the petitioner's claim should be made in case hereafter he may find the respondent possessed of property within the jurisdiction. To the first submission I am unable to accede. As to the second, any inchoate rights the petitioner may have under the statute will be sufficiently considered if I limit the operative order of the Court to that part of the registrar's report which relates to the disposal of the damages, and as to the rest of the petition declare that in the absence of evidence of the existence within the jurisdiction of any property of the respondent subject to be dealt with thereunder, the Court makes no order. The order to be drawn up will be framed accordingly.

Solicitors: *Pearce & Nicholls; T. D. Jones & Co.*

R. M. M.

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(1) (1774) 1 Cowp. K. B. 161, 176.

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May 16.

DIVORCE.

LITTLE *v.* LITTLE.

Divorce—Evidence—Adultery—Decree in previous Suit.

The adultery of a husband respondent in his wife's suit for dissolution of marriage is sufficiently established, subject to identification, by the production of the decree in a former suit, upon which it appears that damages have been assessed against him as co-respondent in respect of the same adultery and that he has been ordered to pay such damages, without the decree in question containing any express and separate finding that he committed the adultery in question.

PETITION by the wife, Heloise Mary Little, for the dissolution of her marriage with Ralph Colbourne Little on the ground of his adultery with Olive Maynard Burley. The suit was undefended. The witnesses called were the petitioner, the process server who served the petition on the respondent husband and O. M. Burley at the office of their solicitor, and Leonard Vivian Burley. L. V. Burley was the husband of O. M. Burley, and a decree nisi had been pronounced on May 6, 1926, dissolving his marriage with O. M. Burley on the ground of her adultery with R. C. Little. L. V. Burley gave evidence identifying, by means of a photograph, the respondent in the present suit, R. C. Little, as the same man that he (L. V. Burley) had sued as co-respondent in the suit in which the decree nisi had been pronounced on May 6, 1926, and further by way of identification he proved that he and his wife had been acquainted with the petitioner and the respondent. The only evidence of the adultery of the respondent was the decree nisi in question. On the face of the decree it appeared that a jury had assessed damages against "Ralph Little the co-respondent in respect of the adultery by him committed with Olive Maynard Burley" and the decree ordered the co-respondent to pay the damages, but there was no express and separate finding that adultery had been committed by Ralph Little with Olive Maynard Burley.

Noel Middleton for the petitioner. The decree is admissible as evidence of adultery against the respondent Little. The recital of the assessment of damages has that effect: *Swan* v. *Swan.* (1) In *Ruck* v. *Ruck* (2) the production of a decree in a previous suit, in which the respondent Ruck had been co-respondent, was held insufficient, because there was no finding against him of any sort. The present case is on all fours with *Swan* v. *Swan.* (1) In that case Sir Francis Jeune distinguished *Ruck* v. *Ruck* (2) on the ground that in *Swan* v. *Swan* (1) the decree recited the assessment of damages against the respondent in a former suit in which he had been co-respondent.

HILL J. I think that the recorded verdict for damages and the order for their payment by the co-respondent necessarily involve a finding that he had committed adultery with the wife of the petitioner in the suit. I think that the fact of his adultery appears as fully from this decree as if it had been set out. On the authority of *Swan* v. *Swan* I pronounce a decree.

Solicitor: *J. Elliott Mallinson.*

R. M. M.

Bednall v. *Bednall* - - [1927] P. 225
Overruled. COLQUITT *v.* COLQUITT
[1948] P. 19

DIVORCE.

1927
May 23, 27.

BEDNALL *v.* BEDNALL AND SHIVUSSAWA.

Divorce—Practice—Custody—Child born out of Wedlock—Legitimacy Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-s.* 1; *s.* 6; *Sch.* 1 (*b*)—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 188 *and Sch.* 6.

In a divorce suit the Court refused to make an order giving to the husband custody of the child of the parties born before the marriage, holding that in a suit, to which only the husband and wife were parties, the Court was not competent to find the facts necessary to make the child a legitimated child by virtue of the Legitimacy Act, 1926.

HUSBAND'S PETITION.

A decree nisi was pronounced on May 23, 1927, dissolving a marriage which was celebrated on July 22, 1922, on the

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(1) (1903) Times Newspaper, March 24, 1903. (2) [1896] P. 152.

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ground of the adultery of the wife. It was alleged in the petition that there was no issue of the marriage, but that "there is a legitimated child—namely, Dorita Cecilia, who was born on May 26, 1922," and the petition proceeded to pray for the custody of the child in question to be given to the petitioner. The case was undefended. The petitioner gave evidence and stated that the child was born out of wedlock, that he was the father of it, that the mother of the child, the respondent, at all material times treated him as such, that he was married to the mother within two months of the birth, that neither parent of the child was at the date of the birth married to a third person, and that he, the petitioner, was, at the date of the marriage, domiciled in England.

H. B. D. Grazebrook for the petitioner. I ask for an order for the custody of the child and, to support the order, a finding of its legitimacy by virtue of the Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60). This is a Court of competent jurisdiction to establish the paternity of the child under cl. 1 (*b*) of the Schedule to that Act. Sect. 6 of the Act also applies. The legitimated child has the same rights in respect of its maintenance and support, as if it had been born legitimate. That implies that an order for its custody can be made.

Cur. adv. vult.

May 27. HILL J. If the child had been issue of the marriage, I should have had no hesitation in giving the petitioner custody of her. I have to consider whether and in what circumstances and upon what proof I can, since the Legitimacy Act, make an order in respect of a child claimed to be a legitimated child of the husband and wife, whose marriage is the subject of the proceedings. I was asked for the petitioner to do two things: (1.) to make a declaration that the child was legitimated, and (2.) to give custody to the petitioner. But when I am asked to make a declaration that the child was legitimated, I must remember that the husband and wife are not the only persons interested in the question whether the child was one to whom the Act applied. The child is interested. The child is not, at present, a party to the suit. In its absence I do not think that I ought to adjudicate upon the question. Other persons may be interested, who are not before the Court. I have, it is true, evidence of the husband who says that the child was born illegitimate, that he was the father, and the mother always treated him as such, that he married the mother two months after the birth, that at the date of the birth neither he nor the mother was married to a third person, that he was at the date of the marriage domiciled in England. This evidence, if acted upon, would show that all the conditions of s. 1, sub-s. 1, of the Legitimacy Act, 1926, were fulfilled, and the effect of the Act would be that the child was legitimated as from January 1, 1927. But I repeat I do not think I ought to find the facts in a proceeding in which only the husband and wife are parties. And until I find the facts I can make no order for custody.

The Act by Sch. 1 (*b*) (*c*) contemplates that paternity may be established by an affiliation order or otherwise by the decree of a Court of competent jurisdiction or by a declaration of legitimacy made under the Legitimacy Declaration Act, 1858, as amended by the Act. Parliament, by the way, seems to have overlooked the fact that the Legitimacy Declaration Act, 1858, was, as to nearly all of it, repealed by the Judicature Act, 1925, which substitutes s. 188 of that Act. But with the suit as at present constituted, I do not think that this Court is a Court of competent jurisdiction.

Reference was made to s. 6 of the Legitimacy Act, 1926; I do not think that that section has any application to custody. It relates to claims by or in respect of a legitimated child for damages, compensation, benefit or other claims of the same class.

Solicitors: *Hewitt, Woollacott & Chown.*

R. M. M.

1927
April 13;
May 12.

DIVORCE.

RICHARDSON (JUDGMENT CREDITOR) *v.* RICHARDSON (JUDGMENT DEBTOR).

NATIONAL BANK OF INDIA, LIMITED (GARNISHEES).

Divorce—Costs—Garnishee Order—Bank Balances of Judgment Debtor within and without Jurisdiction at Head and Branch Offices of Bank—Extent of Garnishee Order—Order XLV., *r.* 1.

In the absence of special agreement it is an implied term of the contract between a bank and its customer that the promise of the bank to repay a balance is a promise to repay it at the branch of the bank where the account is kept and not till after demand at that branch. The obligation of the bank is local, although after local demand and refusal to pay the bank is liable to be sued wherever it can be served. When local demand must be met by payment in a foreign currency the remedy available in an English Court for refusal to pay is a cause of action in damages for breach of contract and not for debt. Order XLV., r. 1, both in principle and on authority contemplates both a garnishee and a debt recoverable within the jurisdiction.

A judgment debtor had a balance in an English bank with foreign branches where foreign currency was in use. It was claimed that a garnishee order obtained in England against the bank should extend to possible balances to the credit of the judgment debtor at its foreign branches:—

Held, that the foreign balances, not constituting a debt recoverable within the jurisdiction, could not be attached by a garnishee order.

SUMMONS adjourned into Court.

The wife, the judgment creditor of her husband for taxed costs of divorce proceedings, amounting to 182*l.* 10*s.* 2*d.*, obtained a garnishee order absolute from a registrar, garnishing the account of the judgment debtor, her husband, at the National Bank of India, Ld., whose head office was in London. There was an admitted balance in favour of the judgment debtor at the head office amounting to 12*l.* 2*s.* 1*d.*, and the garnishee order specified that amount accordingly. The question to be decided was with reference to the extension of the order to any balances to the credit of the judgment debtor that might exist at branches of the bank already named at Mombasa in Kenya Colony and at Dar-es-salaam

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in Tanganyika, Mandated Territory. The judgment creditor sought to have the order so further extended. The garnishees contended that if there were any such balances (of which they had no knowledge) those balances could not be the subject of an order, and that even if they could be so subject, the order would not be a valid discharge to the bank in the local Courts of the branches, and the garnishees further relied on the fact that any accounts that there might be at the branches would be kept in the terms of a foreign currency—namely, Kenya and Tanganyika shillings, and that the Court could not give judgment in terms of a foreign currency, there being no power to enforce such a judgment. The judgment creditor appealed to the judge from the order and asked for an order extending to balances at the branches.

R. Fortune for the judgment creditor. The balance at the London office of the bank is not the only one attachable. The head office and its branches are one for this purpose: *Garnett* v. *M'Kewan.* (1) Notice to a principal is notice to all his agents: *Willis* v. *Bank of England.* (2) There is no distinction between the separate parts of the same undertaking: *Robertson* v. *Sheward.* (3) Moreover, although the making of a garnishee order is discretionary, there is no real risk here of the garnishees having to pay the debt twice over. That is the test: *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (4), distinguishing *Martin* v. *Nadel.* (5) The amount to be recovered under the order will be ascertained by the conversion of the local currency into English money at the date of the order: *Di Ferdinando* v. *Simon, Smits & Co.* (6) It is laid down in *Irwin* v. *Bank of Montreal* (7) that "the bank, although having many places of business is yet the one body—the only debtor to a depositor. A customer having money in different branches has but the one debtor."

(1) (1872) L. R. 8 Ex. 10.
(2) (1835) 4 Ad. & E. 21.
(3) (1840) 1 Man. & G. 511.
(4) [1923] 1 K. B. 673.
(5) [1906] 2 K. B. 26.
(6) [1920] 3 K. B. 409.
(7) (1876) 38 U. C. Q. B. 375, 393.

Sir R. Aske for the garnishees. It is impracticable for the bank to give notice to all its branches of the service of the order. The bank relies on these propositions: (*a*) The debt of the bank so far as its branches are concerned is a foreign debt payable only in the foreign country where it arises; (*b*) The proper remedy for such a debt is recovery in the local Court; (*c*) The judgment creditor cannot attach a debt here which is payable in foreign currency, but must bring an action for damages for non-payment; (*d*) Order XLV., r. 1, is an inapplicable procedure, because judgment for the amount of damages has not been signed. As to (*a*) there is an essential difference between a bank and any other company or business. A debt from a trading company can be recovered from any branch, but it is part of the contract with a bank that money is payable by it where the account is kept and not elsewhere. *Garnett* v. *M'Kewan* (1) is really in my favour on this point. *Woodland* v. *Fear* (2) is to the same effect, as also *Joachimson* v. *Swiss Bank Corporation.* (3) Similarly for the purpose of notice of dishonour of bills the branches are treated as separate: *Prince* v. *Oriental Bank Corporation.* (4) (*b*) As to recovery in the local Court it is obvious that that is the proper remedy. The bank would be able to pay under an order corresponding to attachment, if obtained locally, and in that way would obtain a discharge, but if the order now sought was made the creditor need not resort to the local jurisdiction but could obtain the money at the head office; before he can do that the debt must be transferred here. (*c*) As to recovery here of the debt which is payable in foreign currency it is well established that the cause of action is in damages, and therefore the method of attachment cannot be resorted to: *Di Ferdinando* v. *Simon, Smits & Co.* (5); *Manners* v. *Pearson & Son.* (6)

Fortune in reply.

Cur. adv. vult.

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(1) L. R. 8 Ex. 10.
(2) (1857) 7 E. & B. 519, 521.
(3) [1921] 3 K. B. 110, 127, 129.
(4) (1878) 3 App. Cas. 325, 332.
(5) [1920] 3 K. B. 409.
(6) [1898] 1 Ch. 581, 587.

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May 12. HILL J. The petitioner, the wife, is judgment creditor of the respondent husband for costs amounting to 182*l.* 10*s.* 2*d.*

On January 28, 1927, the judgment creditor obtained a garnishee order nisi directed to the National Bank of India, Ld. The bank appeared to the summons. The bank is a company registered in England. The head office is in London. It has branches at many places abroad, including Mombasa in Kenya Colony and Dar-es-salaam in the Tanganyika Mandated Territory. The judgment debtor was formerly employed in Mombasa, and in January, 1927, was employed in Dar-es-salaam. The affidavit in support of the garnishee proceedings deposed to the belief that the judgment debtor had an account with the bank at Mombasa or at Dar-es-salaam. A copy produced by the bank of the judgment debtor's account at the head office in London showed transfers in 1926 from his account at Mombasa to his account in London and showed a credit balance of 12*l.* 2*s.* 1*d.* on the London account. The bank does not dispute that that amount is subject to the garnishee order. The judgment creditor, however, seeks to make subject to the garnishee order any amounts to the credit of the judgment debtor at the branches in Africa on January 28, 1927. As to that, the bank, by the affidavit of the London sub-manager, says that the head office does not know whether the judgment debtor had in January, 1927, an account at either of the branches. The bank takes up the position that if there are any moneys to his credit at either branch, they cannot be made the subject of a garnishee order here, and that, even if they could, they ought not to be made the subject of a garnishee order, because payment under the order here would not be a good discharge in the Courts of Kenya Colony or Tanganyika. The bank further says that any account at the African branches is kept in a foreign currency—namely, Kenya or Tanganyika shillings, which is a different currency from the English currency. The questions so raised, especially the first, are obviously of great and general importance to banks with foreign branches. I have come to the conclusion that the bank is in the right. For the purposes of my judgment I assume that on January 28, 1927, there were moneys to the credit of the judgment debtor at one of the African branches. Certain contractual obligations of a bank and its customer, in the absence of special agreement, are well ascertained. They include these implied terms, as stated by Atkin L.J. in *Joachimson* v. *Swiss Bank Corporation* (1): (*a*) the promise of the bank to repay is to repay at the branch of the bank where the account is kept, and (*b*) the bank is not to be called upon to pay until payment is demanded at the branch at which the account is kept. The Court was there dealing with a current account, and the actual decision was that in the absence of special agreement a demand by the customer is a necessary ingredient in the cause of action against a banker for money lent. The same principle underlies the judgment of the Judicial Committee in *Rex* v. *Lovitt* (2), which related to a deposit account at the New Brunswick branch of the Bank of British North America. The judgment refers to older cases and says: "In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were 'property situate within the province' of New Brunswick." In another part of the judgment are these words, which are in point: "According to the defendant's contention the bank in London might be called on at any time by a person of whom it would probably know nothing, and with only a limited time in which to obtain the detailed information that would be necessary from the St. John's branch, to pay $90,351 in London without any deduction for cost of transmission or any agreement as to the rate of exchange. No such obligation appears by express words or necessary implication in the contract of the parties, and

(1) [1921] 3 K. B. 110, 127.

(2) [1912] A. C. 212, 218, 219.

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it is very improbable that it was ever contemplated or intended by them. It is true that the money was to be 'accounted for by the Bank of British North America,' but when the circumstances are considered it is seen that those words mean only that the bank is to account for the money as being money payable by them or their agents at St. John's. Thus, if the manager of the St. John's branch refused payment, or if the branch itself were closed, the bank in London would, of course, be liable as a principal, but that fact does not affect the locality of the debt as originally fixed by the parties." So in *Republica de Guatemala* v. *Nunez* (1) Scrutton L.J. speaks of a person who "deposited in an English bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England," and as to current account, in *Clare & Co.* v. *Dresdner Bank* (2) Rowlatt J. said "there is no obligation on a bank to pay in one country a debt due to a customer on current account in another country."

It will be noted that in *Rex* v. *Lovitt* the words used are "primarily at all events." If a demand is made at the branch where the account is kept and payment is refused, the position is altered. Undoubtedly the bank is then liable to be sued wherever it can be served. Thus in *Leader & Co.* v. *Direction der Disconto Gesellschaft* (3), referred to in *Clare & Co.* v. *Dresdner Bank* (2), a demand having been made at Berlin, where the account was kept, and refused, and a writ having been properly served on a branch in England, judgment was given against the bank under Order XIV., the claim being treated as a liquidated demand. It may perhaps be asked whether the cause of action in such a case is for damages for breach of contract to pay at the branch or for money lent. I have not found any case in which that point was discussed. No doubt the bank in such a case is liable in damages, but it may be that, having itself, by its branch, refused to repay, notwithstanding the fulfilment of the condition which was implied in the contract for its benefit,

(1) [1927] 1 K. B. 669, 687.

(2) [1915] 2 K. B. 576, 578.

(3) (1914) 31 Times L. R. 83.

it becomes unconditionally liable to repay. Be that as it may, the bank is not liable anywhere until the demand is made at the branch where the account is kept.

A further difficulty, on the question whether the liability in this country is in damages or in debt, arises when the bank is sued here and the account is kept at the branch abroad in a foreign currency. The questions arising upon a liability to pay in a foreign currency, enforced in the Courts here, had not at the time of *Leader & Co.* v. *Direction der Disconto Gesellschaft* (1) received that full consideration which it has since received in *Di Ferdinando* v. *Simon Smits & Co.* (2) and *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.* (3) The Court of Appeal has made it clear that the cause of action upon refusal to pay in a foreign currency is for damages and not for debt. These considerations lead to the following conclusions in the present case as between the bank and the judgment debtor: (1.) that primarily the bank was liable to pay only at the African branch and upon a demand made at the African branch; (2.) that upon demand at, and refusal to pay by, the African branch the bank could be sued here, but that the breach having been a refusal to pay in a foreign currency, the cause of action here could only be for damages; the bank could not be sued here for money lent.

It has occurred to me to consider whether the obligation of the bank could be put in another way. It is the practice of banks at the request of a customer to transfer amounts to the credit of the customer from one account to another. And perhaps it is an implied term of the contract that the bank shall at the request of the customer make such transfer at the expense of the customer, and, if a conversion from one currency to another is necessary, at the rate of exchange ruling at the time of the transfer. This would get over the difficulty about the difference of currency. But, even if such a term is to be implied, and the request to transfer can be made to the head office and need not be made to the branch where the account is kept, it seems to me that the cause of action must be for damages for refusal to transfer, and that a refusal to transfer at request would not make the money recoverable as money lent elsewhere than at the branch where the account is kept.

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(1) 31 Times L. R. 83.
(2) [1920] 3 K. B. 409.
(3) (1927) 27 L. L. Rep. 288.

Such being the position as between the judgment debtor and the bank, I have to consider whether Order XLV. applies. The bank is no doubt indebted to the judgment debtor and the bank is within the jurisdiction. The Order deals with the case where "any other person is indebted to the judgment debtor and is within the jurisdiction." But both in principle and upon authority, that means "is indebted within the jurisdiction and is within the jurisdiction." The debt must be properly recoverable within the jurisdiction. In principle, attachment of debts is a form of execution, and the general power of execution extends only to property within the jurisdiction of the Court which orders it. A debt is not property within the jurisdiction if it cannot be recovered here. As a matter of authority, the case of *Martin* v. *Nadel* (1), as explained by *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (2), and the decision and judgments in that case show that the Order does not apply unless the debt is properly recoverable within the jurisdiction. In the Swiss case the customer's account was in London. Of it Scrutton L.J. said in that case: "It is a sum held by a banker, who is resident in this country, for his customer, and is not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country." In *Martin* v. *Nadel* (1) the deposit had been made in Berlin, and of it Scrutton L.J. says in the *Swiss Bank* case: "That debt was not in London; it was in Berlin. Nadel having deposited the 500*l.* with the branch in Berlin could not without more have made good a claim to be paid by the London branch. Before he could do anything he must make his claim on the Berlin branch who had the money, not on the London branch who had not."

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(1) [1906] 2 K. B. 26.

(2) [1923] 1 K. B. 673, 681, 682.

In *Joachimson* v. *Swiss Bank Corporation* (1) the Court of Appeal said that the service of a garnishee order nisi was a sufficient demand. But the Court had not to consider whether the service of an order nisi on the bank in London would be a sufficient demand for repayment by a branch abroad. I do not see how it could be so regarded, and when the branch at which the account is kept is abroad, the order nisi cannot be served there.

In the result, I am of opinion that moneys held by the bank to the credit of the judgment debtor at the African branches cannot be made the subject of a garnishee order, for they are not a debt recoverable within the jurisdiction. I add this: If the judgment creditor is right, then upon service of the order nisi, the bank became custodian for the Court of the whole of the funds attached, i.e., for all amounts to credit of the judgment debtor at all its branches, and could not, except at its peril, part with any of those funds in any part of the world (*Rogers* v. *Whiteley* (2)), and the burden would be imposed upon the bank of communicating with all its branches in all parts of the world.

If I am wrong in my conclusion the question will still remain whether the order ought, as a matter of discretion, to be made absolute. It ought not, if payment under it will not be a good discharge in the Courts of Kenya Colony and Tanganyika. One witness whom I have heard is clearly of opinion that it will not be a good discharge. Another suggests that payment made under it in England will not be itself a good discharge in Kenya Colony, but that if the order were registered in Kenya Colony under the Judgments Extension Ordinance of that colony, payment under it by the Kenya branch will be a good discharge. He says the same would apply to Tanganyika. It does not, however, seem clear that the bank could register the order, and the judgment creditor, if she gets the order here, will enforce payment here and will not go to the trouble of registering and enforcing the order abroad. In this state of the law abroad it would be inequitable to make the order.

(1) [1921] 3 K. B. 110, 127, 129.

(2) [1892] A. C. 118.

It is satisfactory to learn from the evidence that the judgment creditor is not without a remedy. She can register in Kenya and Tanganyika the order of this Court for 182*l.* 10*s.* 2*d.*, and then enforce it there by execution.

Appeal dismissed with costs.

Solicitors: *Gordon, Dadds & Co.; Sanderson, Lee & Co.*

R. M. M.

1927
Feb. 14.

DIVORCE.

GULBENKIAN *v.* GULBENKIAN.

Divorce—Post-nuptial Settlement—Policy of Life Insurance—Application of Policy Moneys—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

A life policy effected after marriage by one of the spouses on the life of the spouse effecting it, with a contingent interest of the other spouse in the policy moneys, is a post-nuptial settlement, and after divorce the Court has power under the Judicature (Consolidation) Act, 1925, s. 192, to make orders with reference to the application of the policy moneys.

THE petitioner Herses Gulbenkian, having obtained a decree absolute dissolving his marriage with Satenig Gulbenkian, presented a petition for variation of settlement. There were two children of the marriage in the custody of the petitioner. The registrar reported upon the petition that subsequently to his marriage the petitioner had taken out two policies of insurance upon his life—namely:

(*a*) For 2000*l.* payable on May 14, 1940, to him if then living or, upon proof of his prior death, to his wife.

(*b*) For 500*l.* payable on June 14, 1936, to him if then living or, upon proof of his prior death, to his wife if living, or otherwise to the personal representatives of the assured.

The report submitted that the policies were post-nuptial settlements, and that they should be varied by extinguishing the interests in them of the respondent wife.

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GULBENKIAN v. GULBENKIAN.

The wife had not entered an appearance.

Insurance companies, with whom the policies were effected, had informed the petitioner that they did not propose to appear.

T. Bucknill, for the petitioner, referred to *Stedall* v. *Stedall* (1), and moved to confirm the report.

HILL J. Either the wife has no rights at all under these policies or she has an equitable interest as a prospective cestui que trust. If she has no rights under the policies, no harm can be done by striking her name out of them. If, on the other hand, she has rights, it can only be because by the documents in question the husband has settled 2000*l.* and 500*l.* upon her in certain contingencies. The other parties to the contracts of insurance do not oppose their variation. I, therefore, confirm the report.

Solicitors: *McKenna & Co.*

R. M. M.

DIVORCE.

May 16, 18.

FANSHAWE *v.* FANSHAWE.

Divorce — Alimony pendente lite — Costs — Arrears—Future Instalments — Injunction — Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 45.

The Court will interfere by way of injunction to restrain a husband from dealing with his property so as to defeat an order for costs or alimony pendente lite when the amount of the latter has been fixed and an instalment of it is already due and in arrear, but will not so restrain him in respect of instalments of alimony to become due at a future date.

MOTION for injunction.

The wife, Cicely Ellen Fanshawe, petitioner in the suit, obtained a decree nisi on February 3, 1927, dissolving her marriage with Arthur Hew Bradford Fanshawe. By an order dated January 31, 1927, alimony pending suit had been ordered at the rate of 180*l.* per annum (free of tax) together with a further sum of 50*l.* per annum for the maintenance of a child of the marriage to commence as on November 8, 1926, and to be payable monthly. There was now due and unpaid under this order the sum of 57*l.* 10*s.* and also 106*l.* 0*s.* 8*d.* for costs. On March 21, 1927, an injunction was granted restraining the respondent until further order from dealing with moneys realized from the sale of certain shares in a company, by which he was formerly, but now no longer, employed. The petitioner now moved to continue the injunction.

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(1) (1902) 18 Times L. R. 254.

Noel Middleton for the petitioner. In *Gillet* v. *Gillet* (1) the Court continued an injunction in regard to costs until payment. Although in that case it refused to do so, as regards an allowance, an injunction was clearly not the proper remedy for that purpose, as the allowance had been ordered by a magistrate under 41 & 42 Vict. c. 19, s. 4, which prescribes another remedy. In *Bullus* v. *Bullus* (2) Bigham J. followed *Gillet* v. *Gillet* (1) as regards costs. In *Noakes* v. *Noakes* (3) an attempt to defeat an application to vary a settlement was restrained by an injunction against dealing with property. An injunction has been continued pending the enforcement of an order for the payment of taxed costs: *Brewis* v. *Brewis.* (4) In *Jagger* v. *Jagger* (5) Hill J. deduced from the cases that an injunction could be granted after an order for alimony or maintenance to restrain the husband from dealing with property so as to defeat it. In *Burmester* v. *Burmester* (6) Sir Samuel Evans P., referring to the case of *Newton* v. *Newton* (7), came to the conclusion that so long as there was a subsisting order there was no distinction between alimony pendente lite and permanent maintenance. In *Waterhouse* v. *Waterhouse* (8) the Court of Appeal confirmed a registrar's report on permanent maintenance before decree absolute and

(1) (1889) 14 P. D. 158.
(2) (1910) 26 Times L. R. 330.
(3) (1877) 4 P. D. 60.
(4) [1893] W. N. 6.
(5) [1926] P. 93.
(6) [1913] P. 76.
(7) (1885) 11 P. D. 11.
(8) [1893] P. 284.

therefore before an order for permanent maintenance could be made and restrained the respondent until, within a week of decree absolute, the respondent should have secured the amount fixed by the report. In *Carter* v. *Carter* (1), where an injunction was refused, it did not appear that the respondent was in default.

J. H. Watts for the respondent. Alimony pendente lite is not a final order, and there is no power to order security for it. This is an attempt by the petitioner to get security.

[BATESON J. I think that the question arising in the cases is whether there is a sum fixed and due. *Carter* v. *Carter* (1) is an authority in favour of the respondent that there should be no order in respect of future payments.]

In Rayden on Divorce, 2nd ed., at p. 193, it is laid down, citing *Burmester* v. *Burmester* (2), that there will be no injunction even after an order for alimony pendente lite. When he lost his employment, the respondent might with due diligence have obtained a reduction of the order.

BATESON J. [after stating the facts, continued:] I think that all the cases dealing with this matter have been cited in argument and their result, as I understand, is that the Court will not grant an injunction in a case of alimony pendente lite unless there is a sum fixed and due by some order of the Court. I think that the proper order to make in this case is that the order should go against the husband so far as any sums due and fixed are now to-day existing, that is to say, there is an order for 73*l*. 9*s*. 2*d*. for costs; there are arrears of alimony amounting to 57*l*. 10*s*. which ought to have been paid up to May 8 of this month, and there are the costs of the motion, 32*l*. 11*s*. 6*d*. Beyond that I cannot restrain the husband from dealing with his own property in order to secure future sums which may or may not ever come to be due. I think that it is quite clear from *Carter* v. *Carter* (1) that such an order as is asked for in this case cannot be made so far as future payments of

(1) [1896] P. 35.

(2) [1913] P. 76.

alimony are concerned. In that case there was no sum due. *Burmester* v. *Burmester* (1) makes it quite clear that unless there is an order in existence for the payment of a fixed sum no order can be made. Rayden on Divorce, 2nd ed., p. 193, para. 15, says in terms: "Before an order for the payment of a fixed sum (or even after an order for alimony pendente lite has been made) the Court will not grant an injunction restraining the husband from so dealing with his property as to defeat alimony pendente lite." I think that there the author is thinking of future payments and not payments which are due.

The other cases seem to me to support my judgment, certainly as far as costs are concerned. In *Gillet* v. *Gillet* (2) the injunction was granted, so far as costs were concerned; although it is true that in that case there were arrears under a magistrate's order. But what the learned judge said about that was that he did not think the injunction should be granted in regard to the allowance. He says: "I do not think I have anything to do with the claim under the magistrate's order, and after hearing the circumstances of the case I do not think the injunction should have been granted in regard to the allowance." He does not say that he could not have granted it in a proper case. In *Bullus* v. *Bullus* (3) Bigham J. followed *Gillet* v. *Gillet* (2) so far as regards costs. It does not appear in that case that an injunction was asked for in regard to any arrears of alimony. He begins his judgment by saying: "I shall grant the injunction asked for in this case"—and the injunction asked for was only as to costs. In *Brewis* v. *Brewis* (4) Sir Francis Jeune said: "I will continue the injunction until such time as the order to give security can be enforced—that is, until a week after the order to pay taxed costs has been issued." That seems only to have been an application with regard to costs, and not with regard to arrears. *Newton* v. *Newton* (5) was a case where Sir James Hannen, dealing with the former case

(1) [1913] P. 76, 78.
(2) 14 P. D. 158.
(3) 26 Times L. R. 330.
(4) [1893] W. N. 6.
(5) 11 P. D. 11.

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Bateson J.

of *Noakes* v. *Noakes* (1) and pointing out that the point was never made in *Noakes* v. *Noakes* (1), merely said that he could not grant an injunction quia timet to restrain the respondent from dealing with his property. Therefore in that case there was no order. In *Jagger* v. *Jagger* (2) Hill J. says: "And the effect of those cases is that an injunction can be granted after an order for alimony or maintenance and cannot be granted before order made. That I take to be the effect of *Newton* v. *Newton* (3), *Twentyman* v. *Twentyman* (4), *Burmester* v. *Burmester* (5), and among older cases, *Sidney* v. *Sidney* (6)," but there I think the learned judge is only speaking obiter and is not directly dealing with the question of alimony under an order that has not been obeyed.

Sir Samuel Evans in *Burmester* v. *Burmester* (5) did say that there was no difference in principle between permanent alimony and alimony pendente lite; in quoting *Newton* v. *Newton* (3) he says: "Sir James Hannen, in a considered judgment, deals with the broad question of law, and it seems to me that the proper conclusion to come to is that he did not intend to deal merely with the case of alimony pendente lite, but that he laid down principles equally applicable to cases of permanent alimony and maintenance." There again I think that refers to future alimony and future maintenance and does not deal with arrears.

As counsel for the respondent points out, in this case the petitioner never asked for security, neither in the petition for alimony, nor in the petition for maintenance which is already on the file; and this is an attempt by a side wind to get such a security in the hope that at some time or another there will be an order for permanent maintenance. As things stand at present, according to what counsel for the respondent says, this sum of money that is now in the hands of the solicitors is all the money that the respondent possesses, and it does not at all follow that there will ever be an order

(1) 4 P. D. 60.
(2) [1926] P. 93, 96.
(3) 11 P. D. 11.
(4) [1903] P. 82.
(5) [1913] P. 76, 78.
(6) (1867) 17 L. T. 9.

for maintenance, and to ask anybody to order security—because that is the real effect of this application—in the hopes that an order may be made which most probably never will be made, is an unheard of application. It is an attempt to get security by a side wind in a case where no sum may ever be fixed, and no sum may ever become due. He also points out that if his client had been alert he might have got an order as soon as he lost his employment, reducing the amount of the present order, which he has not obeyed. It seems to me that where an order for alimony is made and is not obeyed, notwithstanding that the respondent has money in his hands wherewith he could pay the money, it is only right that he should pay.

For these reasons I allow this application only so far as it relates to the arrears and costs I have mentioned.

Solicitor for petitioner: *Ernest G. Scott.*
Solicitors for respondent: *Doyle, Devonshire & Co.*

R. M. M.

1927
May 24.

DIVORCE.

CAPRON *v.* CAPRON.

Divorce—Practice—Sequestration—Arrears of permanent Alimony—Onus of Proof of Assets—Matrimonial Causes Rules, 1924, *r.* 79 (*a*), 97—*R. S. C., Orders* XXVIII, *r.* 12; XLIII., *r.* 6.

Process of sequestration in the Divorce Court is governed by the Matrimonial Causes Rules, 1924, r. 79 (*a*), and not by the Supreme Court Rules, Order XLIII., r. 6. According to the former a writ of sequestration is a remedy for non-payment of a sum of money at the time appointed and is accordingly appropriate to the case of non-payment of an instalment of alimony. If it is contended that the issue of the writ would be futile or unreasonable by reason of the absence of available assets, the onus lies upon the party against whom relief is sought to establish that fact.

Semble, further, that even apart from the Divorce Rule, arrears of alimony accrued due come within the scope of Supreme Court Rule XLIII. as constituting disobedience to an order not merely to pay money, but to do so within a limited time.

MOTION for the issue of a writ of sequestration.

Aleida Helena Capron, the wife, on June 10, 1925, obtained a decree of judicial separation on the ground of the desertion of her husband, Claude Capron. On November 27, 1925, an order was made for payment of permanent alimony at the rate of 450*l.* per annum. Orders were subsequently made against the respondent husband for costs. None of the orders had been complied with, except that a small sum for costs had been obtained by the solicitors of the petitioner as the result of proceedings taken abroad. There were now considerable arrears under the orders, notwithstanding the appointment on January 31, 1927, of a receiver on the application of the petitioner. It appeared from the affidavits that the respondent had been disposing of his property since the dates of the orders. He was, however, entitled to two life policies, the surrender value of which was about 1400*l.*, and on this security he had borrowed certain sums, leaving a margin of 400*l.* The receiver had also discovered and obtained a small sum of cash, and the respondent was entitled to one director's share in a company.

[There were preliminary objections on both sides: by the petitioner to the respondent being heard on the ground that he was in contempt, having failed to comply with the orders, and by the respondent that the notice of motion was irregular in form, as asking for the appointment of a single sequestrator. The Court allowed the notice of motion to be amended under Order XXVIII., r. 12, by converting it into an application for the appointment of four sequestrators, and allowed the respondent to be heard, if necessary, as amicus curiæ, although in default, as he had been given notice of the motion.]

T. Bucknill for the petitioner. I ask that the writ may issue against the estate of the respondent generally, with directions to the sequestrators to sell the life policies and the share, and to apply the proceeds in discharge of the liability of the respondent under the orders.

Noel Middleton for the respondent. The case is not within the scope of R. S. C., Order XLIII., r. 6, which with the notes thereto in the Annual Practice forms a code of the practice in sequestration. The order for alimony is not an order to do an act "in a limited time" in the sense of the rule. There is no reported instance of the issue of the writ in this Division in an argued case as to alimony since the Judicature Act. *Willcock* v. *Terrell* (1) and *Sansom* v. *Sansom* (2) are not against me. *Willcock* v. *Terrell* (1) was the case of a judgment debt. *Sansom* v. *Sansom* (2) merely approves *Willcock* v. *Terrell.* (1) They do not deal with the enforcement of an original order to pay by instalments. *Clinton* v. *Clinton* (3) was before the Judicature Act. The issue of the writ is discretionary and turns on the question whether it will be effective: *Hulbert* v. *Cathcart.* (4) There is nothing to show the existence of any asset of marketable value to be seized. The life policies are mortgaged to third parties who are not before the Court, and they cannot be ordered to deliver up securities lawfully in their possession: *Crispin* v. *Cumano* (5); *Craig* v. *Craig.* (6)

[He also referred to *Birch* v. *Birch* (7) and *Hyde* v. *Hyde.* (8)]

T. Bucknill in reply. The case is governed by Matrimonial Causes Rules, 1924, r. 79 (*a*). The Supreme Court Rules do not apply: Matrimonial Causes Rules, 1924, r. 97. In *Willcock* v. *Terrell* (1) a sequestration issued to satisfy instalments due under an order quarterly and in arrear. Sir J. Hannen approved *Willcock* v. *Terrell* (1) in *Sansom* v. *Sansom.* (2)

BATESON J. [after stating the facts:] The petitioner on these facts now moves the Court for a writ of sequestration in order that what little may be left of the respondent's property may be obtained for her benefit.

When the case was called on, counsel for the respondent objected to the form of the motion, as it asked in terms for a single individual to be appointed sequestrator. Counsel for the petitioner objected to counsel for the respondent being heard, as he was in contempt, having failed to obey these various orders, and further asked to be allowed to amend his notice of motion so as to put it into proper form to ask for a writ of sequestration with the necessary amendments of other parts of the motion. I allowed that amendment under Order XXVIII., r. 12, and I also said that I would hear counsel for the respondent, as he had been given notice of this motion, although he was in default, and if there was any trouble about hearing him formally and regularly I would allow him to address me as amicus curiæ.

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(1) (1878) 3 Ex. D. 323.
(2) (1879) 4 P. D. 69.
(3) (1866) L. R. 1 P. & M. 215.
(4) [1896] A. C. 470.
(5) (1869) L. R. 1 P. & M. 622.
(6) [1896] P. 171.
(7) (1883) 8 P. D. 163.
(8) (1888) 13 P. D. 166.

Counsel for the respondent takes two points in resisting my granting this motion, and his two points, as I understand them, are these. First of all, the Rules of the Supreme Court contained in the White Book contain a code that deals with sequestration, and Order XLIII. does not permit of sequestration in a case of this kind. The second point that he takes is that the issue of a writ of sequestration is a matter of discretion, and that if it is idle or futile to order such a writ to issue, or if it is unreasonable, the Court will not use its powers.

I am against him on both these points. I think the Rules of the Supreme Court do not apply to the Divorce Court, and there is a special rule in the Matrimonial Causes Rules, r. 97, which says: "In any matter of practice or procedure which is not governed by Statute or dealt with by these rules, the Rules of the Supreme Court in respect of like matters shall be deemed to apply." But when one comes to look at the Matrimonial Causes Rules, r. 79 (*a*) specially deals with the very matter which we are discussing: "In default of payment to any person of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of fieri facias, sequestration, or elegit shall be sealed and issued as of course in the Registry upon an affidavit of service of the order and of non-payment." So that here there is a special rule which seems to me to cover this case exactly. Further than that, if there was not such a special rule, I myself think that this is within the Rules of Supreme Court, Order XLIII., r. 6,

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because the order for payment of alimony by monthly payments is in my view an act to be done in a limited time. Rule 6 says: "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person." I think that this is not a mere order to pay a yearly sum per annum for maintenance by monthly instalments. It is something more than a mere order for the payment of money. It is an act which has to be done at regular times in accordance with the terms of the order, and in my judgment, when the Court has ordered money to be paid monthly, it means that the moneys are to be paid within the month, which I think is a limited time, so that on either view of the case in this regard the argument fails.

He then goes on to say that there has been no argued case since the Judicature Act in which a writ of sequestration has been allowed to go in respect of alimony. Nobody questions that before the Judicature Act a writ of sequestration in the case of alimony was utilized as a means of enforcing payment. *Clinton* v. *Clinton* (1) makes that quite clear. Since the Judicature Act *Willcock* v. *Terrell* (2) in 1878 makes it clear that a writ of sequestration may go where quarterly payments have been ordered to be paid. *Willcock* v. *Terrell* (2) has been approved by Sir James Hannen in *Sansom* v. *Sansom* (3), where the President said: "When I made the order complained of, I intended that it should be in accordance with the terms of the order in *Willcock* v. *Terrell* (2), and it must be varied accordingly." The other cases that were referred to, *Birch* v. *Birch* (4) and *Hyde* v. *Hyde* (5), do not in any way conflict with what I am saying, but I do not think they carry the case any further.

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(1) L. R. 1 P. & M. 215.

(2) 3 Ex. D. 323.

(3) 4 P. D. 69, 71.

(4) 8 P. D. 163.

(5) 13 P. D. 166.

Now with regard to the other point that to make such an order in this case would be futile, or idle, or unreasonable, I think that is quite a mistaken view. The evidence before me which is contained in the affidavits that have been read makes it quite clear that there are policies, out of which something may be salved. There is a share in all probability in the Imperial Tobacco Company, or one of the tobacco companies, which may or may not be of some value. I am not told what it is. It is supposed to be a director's share, which may or may not have some special value. It is known that this respondent had property in this country and has made away with a great deal of it, and it does not follow that he may not have other property which may be found when further investigation takes place. In fact, since the receiver was appointed a sum of money has been collected by the receiver about which apparently nobody knew anything at the time. As is said by Lord Herschell in *Hulbert* v. *Cathcart* (1): "It seems to me to rest upon the debtor who alleges that the proceeding would be futile to show to the Court that it would be so." Although counsel has argued that, I think I have had no evidence to show that it would be so. I am certainly not satisfied that it would be futile. Then Lord Herschell goes on to say: "In the present case it is stated that the respondent has a large yearly income"—that is what was stated here—" and I do not think that there is anything to show that this sequestration will necessarily and inevitably be futile. It is enough to say that. It is impossible now to determine, and this is not the time for it, what could be seized, or whether the result of the proceeding will be to secure to the appellants their debt or not." I think those remarks apply with equal force in this case. So far as the policies are concerned, it seems perfectly clear that if it is true that there are mortgages to the extent of 1000*l.*, there is still a considerable amount of value in the policies now beyond the 1000*l.*, and there can be no great difficulty

(1) [1896] A. C. 470, 474.

in persuading the mortgagees to take their money and interest so as to allow the sequestrators to get the benefit of the balance ; at least, I think not. At any rate it will be well worth trying.

Another suggestion was that by ordering a writ of sequestration to go I was really making an order against a third party. That, of course, I am not doing, and I am not pretending to do so. It was said I am making an order against the Sun Life Office, and the Sun Life Office is not before me now. I do not even know that it holds the policies—there is no evidence that it does—but it was suggested in argument that it was certain that it must do so, because there are liens upon the policies. I do not think it follows, although it may be a fact, but certainly I am not making an order against the Sun Life Office. It is not before me, and I do not know what attitude it might think wise to adopt. The authorities in support of the view that the Court does not make orders against third parties—*Crispin* v. *Cumano* (1) and *Craig* v. *Craig* (2)—were referred to, but as I am not making any such order, or pretending to do so, I do not think it necessary to say more about those cases.

For these reasons this writ must issue with leave to sell the policies and the shares in the tobacco company. The motion will be allowed with costs to the petitioner.

Solicitors for petitioner : *Lewis & Lewis.*
Solicitors for respondent : *Timbrell, Deighton & Nichols.*

(1) L. R. 1 P. & M. 622.
(2) [1896] P. 171.

R. M. M.

C. A.

1927
June 28, 29, 30.

[IN THE COURT OF APPEAL.]

THE JUPITER (No. 3).

Shipping—Action for Declaration of Possession of Ship—Russian Company —Nationalization Decrees of Soviet Government—Action by French Administrator—Right to sue.

In 1924, acting on behalf of the Union of Socialist Soviet Republics (the U. S. S. R.), an English company purported to sell the steamship *J.*, then lying at Dartmouth, to the defendants, an Italian company. The *J.* had belonged to a Petrograd company whose ships were registered at Odessa, in the Ukraine, and the U. S. S. R. asserted that under nationalization decrees made in January, 1918, and March, 1919, all vessels of the Russian mercantile marine had become State property and that the company had ceased to exist. The *J.*, with other vessels of the company, had left Odessa in April, 1919, and business was carried on at Marseilles under the French equivalent of the Russian name. In 1920–21 the French Courts appointed an administrator of the ships, including the *J.* In March, 1924, the master, who had been in the service of the Russian company for many years, handed over the *J.* at Dartmouth to the representatives in London of the U. S. S. R. The present action was brought in the French name of the company, and in the name of the administrator and others against " the steamship *J.*," claiming possession. The Italian company appeared to the writ, but the defence was conducted in the name of that company by the U. S. S. R. :—

Held, affirming the decision of Hill J., ante, p. 122, that the nationalization decrees had no effect on property not situate within the territory of the U. S. S. R.; that the *J.* was not at the date when the decrees were promulgated within the territory of either of the Republics which later, with others, formed the U. S. S. R.—namely, the Russian Socialist Federative Soviet Republic or the Ukrainian S. S. R., which latter Republic had not then come into existence; and that at the time when the ship was handed over to the U. S. S. R. she was in the lawful possession of the French administrator who had established sufficient possessory title to maintain the action.

APPEAL from a judgment of Hill J. in an action in rem for possession.

The appellants, the Cantiere Olivo Società Anonima, to whom the Arcos Steamship Company, Ld., acting on behalf of the Union of Socialist Soviet Republics (hereinafter referred to as " the U. S. S. R."), had purported to sell the steamship *Jupiter*, sought to set aside a declaration for possession which had been granted to an administrator appointed by the French Courts under circumstances which are summarized in the headnote and will be found fully set out in the report of the case in the Court below. (1)

C. R. Dunlop K.C. and *H. L. Murphy* for the appellants. The master of the *Jupiter* was in actual possession of the ship for the persons whom, until March, 1924, he believed to be the true owners—namely, the Russian company—when, as a citizen of the U. S. S. R., he was persuaded that the Soviet Government were the owners. He was in the position of negotiorum gestor; he it was who obtained the appointment of persons to represent him in France; he did not have possession for them. Even assuming that the French administrator had a right to the possession of the ship, it was possession for the true owners and not in his own right; further, the administrator had no title to sue in an English Court unless he first obtained a grant of administration in this country.

The nationalization decrees of January 26, 1918, and March 4, 1919, had legislative effect; but even if their effect was not to dissolve the company, at any rate they operated on it to the extent that all rights which the company at Petrograd could exercise became vested in the Soviet Government: see, as to the effect of the nationalization decrees on banking companies, *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2) and *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (3) The U. S. S. R. therefore was entitled to take possession of the *Jupiter* when it could put its hands on her. The appellants also rely on the observations of Scrutton L.J. in *Luther* v. *Sagor & Co.* (4)

[Reference was also made to *Goukassow's* case. (5)]

Langton K.C. and *Carpmael* for the respondents were not called on.

BANKES L.J. In this appeal from a judgment of Hill J. the question in the action was, which of the two claimants

(1) Ante, p. 122.
(2) [1925] A. C. 112.
(3) [1927] A. C. 95.
(4) [1921] 3 K. B. 532, 555.
(5) [1925] A. C. 150.

before the Court, an administrator appointed by the French Court on the one hand and an Italian company on the other, was entitled to the steamship *Jupiter* in March, 1924.

The case was fought most elaborately before the learned judge in the Court below, and in a very careful and detailed judgment he dealt exhaustively with the many points that were raised before him. It is not necessary, in my opinion, to refer to a number of those points. The two main questions that emerge, indeed I think the only two questions which emerge, in this appeal, are : first, whether the Italian company have a title superior to any title to which the French administrator can make a claim ; and, secondly, whether in the events which happened, the French administrator has established that he has a sufficient possessory title to maintain the action. Those are the two questions, and, of course, the more important is the first one, because if that is established it becomes unnecessary to consider the second. The first question, in my opinion, depends entirely upon questions of fact, because it depends partly on questions of Russian law, which must be treated as questions of fact, and also upon what I may call pure questions of fact. The learned judge has come to a clear conclusion on all those points, and, for reasons which I will give in a moment, I see no ground whatever for differing from his conclusions.

On the first point the case for the Italian company was put in this way. It was said that although the vessel originally belonged to a Russian company whose headquarters were at Petrograd, and a company therefore subject to Russian law, by decrees of the Soviet Republic and in particular by a decree of January 26, 1918, the whole of the property of the company was nationalized, and that as the result of the decree the property of the company, including the *Jupiter*, passed to the Soviet Republic, provided possibly that it was in a position to take possession and did take possession of the property. It was admitted that a considerable time elapsed between the date of the decree and the nationalization of the property of the company and the taking of possession of the vessel, the reason being that she had ceased to trade in what may be called Russian waters, and had been occupied in trading between this country and America. For some years before March, 1924, she had been laid up, first at Plymouth and afterwards at Dartmouth, when, owing to the action of her captain, the Soviet Republic were enabled to take possession of her. It was said that the effect of the decree, coupled with that taking of possession, created a complete transfer of the property in the *Jupiter* to the Soviet Republic, and that it in turn sold the vessel to the Italian company, who under those circumstances established a title which must be superior to the title of the French administrator. That was the way in which the claim was put forward on behalf of the defendants, against whom the action was brought.

The answer to that, as found by Hill J., was that assuming the decree had the effect contended for, and assuming that the circumstances which occurred in March, 1924, amounted to a taking possession of the vessel, yet for two reasons the Italian company had not made out their case. First, on his view of the evidence as to Russian law, he came to the conclusion —and I see no reason whatever for differing from him—that the decree had no operation to transfer any property except property within the jurisdiction of the Soviet Republic. The learned judge first expresses an opinion about the decrees He says: "If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so." (1) It is not necessary and I do not wish to express any opinion upon that. The learned judge then comes to the second question: "As to the second question—that is the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels." (1) He refers to some dicta and some cases, which he thinks are in support of his view, deals with the evidence, and comes to the conclusion upon the evidence of Russian law that the decrees have no application to property not situate within the jurisdiction of the Soviet Republic.

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(1) Ante, pp. 122, 144.

The learned judge then proceeded to consider the next material question, that is whether the *Jupiter* was at any material time within the territory of the Soviet Republic. That again is a question of fact. The judge went very fully into the whole matter, and came to the conclusion that it was not proved that the *Jupiter* ever was within the territory of the Soviet Republic. If that view of the law and the facts is correct—and I see no reason to differ from it—it follows that the Italian company have failed to establish the superior title which they were setting up as against the claim of the plaintiff, that he by virtue of the French decree had such a possessory right in this vessel as to entitle him to maintain the action.

The only other question is whether the learned judge was right in coming to the conclusion that of these several plaintiffs, the one plaintiff who had been appointed by the French Court as administrator of the property of a number of persons who had sought to transfer the business of the Russian company to Paris, and who were, among other things, directing the management of some of the vessels which had belonged to this Russian company, including the *Jupiter*, had a sufficient possessory title under the decree entitling him to maintain the action. I do not think Mr. Dunlop seriously contended to the contrary; but whether that contention was or was not made, in my view it could not succeed, because in my opinion it is plain, on the terms of the order of the French Court, that M. Bourgeois certainly had a sufficient title to maintain this action as against any one except some one who could establish that he had a superior title to that to which M. Bourgeois laid claim.

I think under those circumstances it is unnecessary to go into the many matters which were so fully and exhaustively dealt with by the learned judge. I do not wish to disagree with any of his conclusions, but I satisfy myself by saying that on these three particular, and, as it seems to me, vital matters, I agree with him. The result is that the appeal fails and must be dismissed with costs.

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THE JUPITER (No. 3).

ATKIN L.J. In my judgment the appellants have not displaced any of the conclusions of fact arrived at by the learned judge below, or any of his conclusions of law based upon the conclusions of fact. His judgment appears to me to be admirable, and I content myself with saying that I agree with it, and that it is unnecessary to add anything to what my Lord has said on the matter. For these reasons I agree that the appeal should be dismissed.

LAWRENCE L.J. I agree, and have very little to add to the very careful and exhaustive judgment delivered by Hill J., which I think was perfectly right and covers all the points raised before us.

In my opinion the determining factors in this case are: (1) That the nationalizing decrees of the U. S. S. R. do not operate on property outside the territory of that Republic, whether such property belonged to a Russian citizen or not (2) That the *Jupiter* was not at the date when those decrees were promulgated, and has not since been within the territory of that Republic and (3) That at the time when the *Jupiter* was handed over by the master to the U. S. S. R. she was in the lawful possession of the French provisional administrator. The learned judge has treated these three matters, and rightly I think, as pure questions of fact to be decided upon the evidence which was adduced before him at the trial. There was ample evidence to support those findings of fact, and I see no reason for disturbing them. In these circumstances it follows that the plaintiffs have established their case and that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Wynne-Baxter & Keeble.*
Solicitors for the respondents: *William A. Crump & Son.*

E. C. M. T.

1927
May 10, 12, 27.

THE BACKWORTH.

Shipping—Collision—River Thames—Duty of Vessel rounding Point against Tide—Port of London River Bye-laws, 1914, *r.* 36.

By r. 36 of the Port of London River Bye-laws, 1914, "every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her":—

Held, that the rule imposed two duties on the vessel navigating against the tide; (i.) to ease her speed, and (ii.) if necessary, to stop and wait; but that the words "if necessary" meant "if necessary to avoid risk of collision" and not "if necessary in order to allow the vessel navigating with the tide to round and pass clear"; and that a vessel going down the river against the tide which eased her speed on approaching Blackwall Point was not to blame for not then stopping, as there was nothing at that time to make it dangerous or risky for her to pass the point at the same time as an upcoming vessel with which—owing to the negligent navigation of two other vessels—she afterwards came into collision.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship *Sentry*; the defendants and counter-claimants were the owners of the steamship *Backworth.* The collision took place in the Thames, off Blackwall Point, and the defendants alleged (inter alia) that the *Sentry*, the vessel proceeding against the tide, was to blame under r. 36 of the Port of London River Bye-laws, 1914, for failing to stop and wait before rounding the point so as to allow the *Backworth* to round and pass clear. The facts and the arguments on the construction of r. 36 are fully set out in the judgment.

Stephens K.C. and *Dumas* for the plaintiffs.
Langton K.C. and *Alfred Bucknill* for the defendants.

Cur. adv. vult.

May 27. Hill J. The ships involved in this case are the *Sentry*, a vessel of 1354 tons gross, 230 feet long, with a draught of 13 feet 7 inches forward and 16 feet 8 inches aft, and the *Backworth*, a steamship of 2481 tons gross, 303 feet long, drawing 19 feet 10 inches on an even keel. The *Backworth* was in charge of a pilot. The *Sentry* was bound down the Thames, the *Backworth* was bound up, and they met in collision off Blackwall Point about off Green's Upper Dry Dock and a little north of mid-river. The time was about 6.55 P.M. (B. S. T.) on September 16, 1926. The weather was fine and clear. The tide was flood, of the force of about 1½ knots. High water at London Bridge was at 7.58 P.M.

The *Sentry*—before anything happened—was proceeding down south of mid-river. As to the *Backworth*, I find that she was coming up in about mid-river, not south of mid-river. There was not much other traffic in the neighbourhood. Two tugs with craft in tow were coming up, both nearer the north shore than the *Backworth*. The *Backworth* had overtaken and passed one, and was overtaking the other. There were also two motor boats, the one towing the other, coming up. They were further up river than the *Backworth*, and when first seen by the *Sentry* were south of mid-river, but shaping to pass to the north side.

The *Sentry* and the *Backworth* were in collision, each striking with stem or close to the stem; the angle is in dispute, but is not of much importance, unless it proves that the *Sentry* starboarded. On the evidence as a whole I am satisfied that the *Sentry* did not starboard, and that whatever angle she got to the north shore was by reason of her stopping her engines and ceasing to port, as I shall presently describe, and getting the stronger tide on her starboard bow. Undoubtedly the effect of that was to give her an angle to the north shore and to bring her to a position in which some part of her, at any rate, was north of mid-river. Prima facie, the *Sentry*, proceeding down and being found with her bows north of mid-river in collision with the *Backworth* proceeding up, and being at the time north of mid-river, the *Sentry* is to blame.

Her case is that she could not help herself. In Blackwall Reach she was proceeding down south of mid-river in her proper water. She had been at slow, had increased to half speed for a short time, and had again reduced to slow when a little above Blackwall Tunnel. She was now approaching Blackwall Point at a speed of about four knots. Being at slow, she saw the *Backworth* approaching the Point from the opposite direction. Her witnesses said that the *Backworth* was south of mid-river, but that I have not accepted; the *Backworth* was in mid-river. The *Sentry* had also seen the two motor boats, which were south of mid-river but were shaping to cross to the north of mid-river and to pass the *Sentry* port to port. There was nothing likely to cause any difficulty if every one acted on the rule of passing port to port. The motor boats did in fact draw on to the port bow of the *Sentry* and were in a position to pass port to port. The helm of the *Sentry* was ordered hard-a-port for the bend and, as her master said, also for the *Backworth*; and there would have been no difficulty in the *Sentry* rounding the bend on the south side of the river while the *Backworth* went round the bend on the north side of the river. But the motor boats altered their course to recross to the *Sentry's* starboard bow, thus creating a position of danger; and in this attempt the tow rope parted, and the *Sentry* was then in great danger of collision with the second motor boat. The other, after attempts to get hold of the second, which failed, got away to the southward. The second was left helpless. The *Sentry* stopped her engines and steadied her helm. The effect of this, coupled with the tide, was that she got a cant to port. She thereby escaped collision with the second motor boat, which passed her starboard bow at close distance. The *Sentry* then ported, let go her starboard anchor, and put her engines full speed astern. But she could not prevent herself getting partly athwart and partly north of mid-river, and so her stem struck the *Backworth*.

The plaintiffs' witnesses say that there was nothing else the *Sentry* could do, when confronted with the difficulty created by the improper navigation of the motor boats and the breaking adrift of the second motor boat. Witnesses called by the defendants agree with that view. The Elder Brethren agree. I agree. So far, then, the collision was not due to any negligence on the part of those on board the *Sentry*.

It is, however, contended that the collision was due to negligence antecedent to the time when the motor boats created the position of difficulty by starboarding across the bows of the *Sentry*. I will consider that when I have considered the case made against the *Backworth*. I have already found that the *Backworth* was not proceeding up to the south of mid-river. The only fault that could be suggested is that she did not reverse soon enough. [His Lordship dealt with the evidence on this point, and held that there was no delay and that there was no fault in the navigation of the *Backworth*.] So far, then, the collision happened without negligence on the part of either ship.

That leaves for consideration the charge made against the *Sentry*, based upon r. 36 of the Port of London River Bye-laws, 1914. In the defendants' charges it is alleged thus: "They failed to ease their speed on approaching Blackwall Point, and stop and wait before rounding, so as to allow the *Backworth* to round and pass clear." The duty of a steamship approaching a point in the River Thames against the tide when other vessels are approaching the same point with the tide has been the subject of rule for many years past. But the rule has not always been expressed in the same terms. Rule 23 of the 1880 Bye-laws was thus expressed: "Steam vessels navigating against the tide shall, before rounding [certain named points, which included Blackwall Point] ease their engines and wait until any other vessels rounding the point with the tide have passed clear." That rule was interpreted, and, as interpreted, made the basis of the decisions in *The Libra* (1) and *The Margaret* (*Cayzer, Irvine & Co.* v. *Carron Co.*). (2) Rule 47 of the Bye-laws of 1898 was thus expressed: "Steam vessels navigating against the tide shall, before rounding [certain named points, which included Blackwall Point] wait until any other vessels rounding the point with the tide have passed clear." That rule was interpreted, and, as interpreted, made the basis of the decision in *The Ovingdean Grange*. (3) The object of both rules was stated to be to prevent vessels meeting on the point, and the duty of the ship navigating against the tide was that she should "so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there. The vessel going against tide is not only to wait until the other has passed the point, but to wait until the other has passed her": Brett L.J. in *The Libra.* (1)

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(1) (1881) 6 P. D. 139.
(2) (1884) 9 App. Cas. 873.
(3) [1902] P. 208.

Rule 36 of the 1914 Bye-laws is not limited to certain named points, but applies to all points or sharp bends. It is in the following terms: "Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her." The rule was the subject of discussion in the Court of Appeal and the House of Lords in *The Hontestroom* (2), but the majority of the House of Lords decided that as there was no tide at the time in question the rule did not apply. The minority (Lord Phillimore and Lord Blanesburgh) held that it did apply, but further held that the collision was caused not by the *Hontestroom* neglecting to wait but by the starboarding of the *Hontestroom.* There was therefore no actual decision based upon a breach of the rule. At the same time the judgments both in the Court of Appeal and the House of Lords throw much light upon the meaning of the rule. I need not consider what bends are included in the words "points or sharp bends." Undoubtedly the bend at Blackwall Point is a sharp bend. Nor need I consider what precisely is meant by "ease her speed." The *Sentry* on approaching Blackwall Point—namely, when about the Thames Tunnel—did reduce her speed to slow. She was about where the *Hontestroom* was when that vessel put her engines at slow, as found by the President; and, with regard to that, Lord Phillimore said that under the rule "a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the *Hontestroom* did." (3)

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(1) 6 P. D. 139, 145.

(2) [1927] A. C. 37.

(3) [1927] A. C. 37, 55.

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THE BACKWORTH.

Hill J.

What I have to consider is whether it was the duty of the *Sentry* to stop and wait above the point until the upcoming vessels had rounded the bend and passed clear of her. If it was her duty to so hold back, she did not do it. If she had done it, she would not have reached the place of collision, and the case would be very similar to that of *The Ovingdean Grange* (1), where the *Forsete*, which did not wait, found herself hampered by a barge, and it was said that she was unable to extricate herself from a position where she should not have been. So in *The Hontestroom* (2) Lord Sumner said: "The point [i.e., whether there was any tide] is crucial, for it is surely plain that, if the *Hontestroom* was bound to comply with the rule and had fully done so, there would have been no collision, for she would have been waiting above the point well clear of the *Sagaporack* at the material time."

The argument for the defendants is, in effect, that the present rule means the same thing as the former rules, and that the steamship meeting the tide must so regulate her speed by easing, and, if necessary, stopping, that the vessels do not meet on the point. The plaintiffs' construction of the rule is that she must in any case ease her speed and, if the circumstances make it necessary, she must stop and wait until the upcoming vessels have rounded the point and passed clear.

In my opinion the words "so as to allow," etc., are not to be read with the words, "ease her speed." In the textbooks there is a comma after "speed," and no comma before "so." I have, however, seen a print published by authority with no comma at all, and I therefore found nothing upon the punctuation. But if "so as to allow" is to be read with "ease her speed" there was no need to provide for anything else. If the ship was bound to ease in such a way that she did not meet the other on the point, that obligation would without question oblige her to stop if that was necessary to prevent her meeting on the point. I read the rule as imposing two duties: (i.) "Ease her speed"; (ii.) "If necessary stop and wait before rounding, so as to allow any vessel navigating with the tide to round and pass clear." Again, in support of that view I quote Lord Phillimore: "Under the Thames Rule No. 36 a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the *Hontestroom* did. She should also, if necessary, stop and wait before rounding so as to allow any vessel navigating with the tide . . . . to pass clear. This the *Hontestroom* did not do." (1)

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(1) [1902] P. 208.

(2) [1927] A. C. 37, 51.

The next question is the meaning of the words "if necessary." The defendants contend that they mean "if necessary in order to allow the other vessel to round and pass clear." If that be the meaning, it is ill-expressed by the phrase "so as to allow." I do not think that that is the meaning. I think "if necessary" means "if necessary in order to avoid risk of collision." In that view I am strengthened by what was said in *The Hontestroom* (2), both in the Court of Appeal and in the House of Lords. The Court of Appeal asked their assessors these questions: "Having regard (*a*) to rule 36 . . . . (*b*) the presence of the *Corfe Castle* and the *Durham Castle* . . . . (*c*) the sailing barge crossing from N. to S., were those in charge of the *Hontestroom* guilty of a want of care and proper seamanship (i.) in starboarding for the barge; (ii.) in not stopping and allowing the *Sagaporack* to pass clear?" When they so asked the second question the Court of Appeal cannot have thought that, in all circumstances, the *Hontestroom* was bound to stop and wait until the *Sagaporack* had rounded. They treat it as a question of seamanship depending on the state of traffic at the time. Similarly, in the House of Lords, Lord Sumner said the rule "adapts the action (if action there is to be) *to the circumstances of the moment* by distinguishing between obligatory easing of speed and stopping only if there is also necessity." Lord Phillimore said that the object of the rule "is to prevent the simultaneous passing of a point . . . . *if such simultaneous passing be dangerous.*" (2)

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(1) [1927] A. C. 37, 55.

(2) (1925) 22 Ll. L. Rep. 458, 461; [1927] A. C. 37, 52, 55.

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THE BACKWORTH.

Hill J

It is true that, if in the opinion of the majority there had been any tide, the House of Lords would with one voice have held the *Hontestroom* to blame—but the circumstances have to be remembered. It was night. The *Hontestroom* was light. She had ahead of her the *Durham Castle* (of more than 8000 tons), which backed out of the East India Dock Basin and straightened down a little north of mid-channel, the *Corfe Castle* just below the basin waiting to enter, the *Sagaporack*, of over 5000 tons, coming up Bugsby's Reach, and a sailing barge crossing the bows of the *Hontestroom*. The position was very different from the position in the present case. Here it was daylight and fine and clear; there was no traffic out of or into the dock; there was no sailing barge; both the *Sentry* and the *Backworth* were of moderate size; the tugs and craft proceeding up near the north shore were in nobody's way; the *Backworth* was not south of mid-river; and the two motor boats, though they were south of mid-river, were shaping to pass to their proper side and on to the port bow of the *Sentry*, as indeed they did. Such being the circumstances of the moment, the Elder Brethren are of opinion that there was no want of due care or seamanship in the *Sentry* continuing at slow speed, and that there was nothing to make it dangerous or risky for her to pass the point at the same time as the *Backworth*. The risk of collision was created by the faulty manœuvre of the motor boats. I am entirely of that opinion.

I hold that the *Sentry* was not guilty of any breach of r. 36. Both claim and counterclaim, therefore, fail.

Solicitors for the plaintiffs: *Parker, Garrett & Co.*

Solicitors for the defendants: *Botterell & Roche.*

E. C. M. T.

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May 16, 17;
June 2.

[IN THE COURT OF APPEAL.]

Applied. *In re* R., DECD. [1951] P. 10

In the Estate of LAVINIA MUSGROVE.

DAVIS *v.* MAYHEW.

Probate—Will—Not proved by Executrix—Death of Executrix and attesting Witnesses—Production of Will sixteen Years after Death of Testatrix—Suspicious Circumstances attending Non-production—Presumption, "omnia rite esse acta," without evidence aliunde.

By a document dated in 1890 L. M. purported to appoint her cousin, E. M. D., her executrix, and to bequeath the whole of her property to A. D., the daughter of E. M. D., absolutely. L. M. died in 1905. The executrix took no steps to prove the document as a will, and died in 1924. In 1925 the document was found by the plaintiff in a desk which had been in the possession of the executrix up to the time of her death. Both the attesting witnesses were dead. The plaintiff, as personal representative of his late wife, A. D., propounded as the will of L. M. this apparently duly executed document, which was a printed form of will filled up in a handwriting that was not proved, but containing signatures of L. M. and of two attesting witnesses, of whom the executrix was one, the signatures of the attesting witnesses being opposite a formal attestation clause. All the signatures were proved to be in the handwriting of the respective persons:—

Held, by Hill J., that suspicion was excited in his mind that there was something about the document which prevented the executrix from putting it forward as the genuine will of L. M.; that the onus lay on the plaintiff to remove that suspicion; and that, in the absence of evidence aliunde, the maxim "Omnia praesumuntur rite esse acta" could not be relied upon as sufficient for that purpose:—

Held, by the Court of Appeal (reversing the decision of Hill J.), that there was sufficient internal evidence to show that L. M. knew and approved of the contents of the will at the time of its execution; that the suspicion arose at a later time and did not relate to the date of the execution; and, therefore, that the presumption "omnia rite esse acta" must prevail, and that in such circumstances the Court would, without evidence aliunde, presume that the document was duly executed and that L. M. knew and approved of its contents.

APPEAL by the plaintiff, William George Davis, from a judgment of Hill J., by which he pronounced against a will of Lavinia Musgrove, deceased, propounded by the plaintiff.

The defendant, Lily Mayhew, was the administratrix de bonis non of the deceased and claimed as under an intestacy.

The following statement of the facts is taken substantially from the considered judgment of the learned judge:—

The deceased, Lavinia Musgrove, died on March 16, 1905. The document which purported to be her will bore date September 9, 1890. Upon her death she was supposed to be intestate, and her brother, Alfred Musgrove, as sole next of kin, obtained letters of administration to her estate. He died on July 31, 1924. The document was on a printed will form, and was expressed to be the last will of "me, Lavinia Musgrove, of 204 High Street, Deptford." It appointed "Emma Mercy Dunmall, Well Hill, Chelsfield, Kent, executrix." It bequeathed "to Agnes Maria Dunmall all my property real and personal of which I may be possessed for her own use absolutely." The blanks in the attestation clause were filled in, and against it were the names Emma Mercy Dunmall and Thomas Wood, Crockenhill, St. Mary Cray. In form, therefore, it was complete. All the signatories were dead. It was proved by one Donnelley, a second cousin who had corresponded with her, that the signature "L. Musgrove" was in the handwriting of the deceased. The plaintiff proved that the signature of Emma Mercy Dunmall, who was his mother-in-law, was in her handwriting, and a daughter of the other witness proved that the signature "Thomas Wood" and his address were in his handwriting, and that he died in 1897, and lived at the address mentioned. The writing in the body of the will and in the attestation clause was not proved. The learned judge was unable to satisfy himself whether or not the written words were in the handwriting of Lavinia Musgrove. There were some resemblances to and differences from contemporary writings of hers. It was obvious that a legal form had been followed in the wording, but the document did not look like one prepared by a lawyer. Emma Mercy Dunmall was a cousin of Lavinia Musgrove, and Agnes Maria Dunmall, who was a child in 1890, was the former's illegitimate daughter. Emma Mercy Dunmall died on April 12, 1924, aged seventy-eight, having outlived Lavinia Musgrove by nineteen years, and at the time of the death of Lavinia Musgrove was about fifty-nine years of age. The learned judge found as a fact that she knew of the death of Lavinia Musgrove as early as the autumn of 1908. Agnes Maria Dunmall in March, 1900, married the plaintiff. She died in October, 1925, and the plaintiff proved her will, dated July 16, 1925, as sole executor. Upon the death of Emma Mercy Dunmall, Agnes and the plaintiff removed to their own house, among other things which had belonged to Emma Mercy Dunmall, a desk containing papers. In June, 1925, that desk was turned out, and in it was found the document in question. Neither the plaintiff nor Agnes had any previous knowledge that the document existed, or that it ever had existed. In 1900 Lavinia Musgrove lived at 204 High Street, Deptford, with her brother Alfred, who was a butcher. In September, 1904, she and her brother retired from business and went to live at Brighton. They lived on most affectionate terms. A few days before her death she said to her brother: "Alf, it's time you and I were thinking of making our wills." After the removal to Brighton the only evidence of any communication between Lavinia Musgrove and Agnes or Emma Mercy Dunmall was that upon the marriage of Agnes with the plaintiff Lavinia Musgrove sent Agnes a wedding present. It was clear that it was a surprise to Agnes and the plaintiff in 1908 to hear that Lavinia Musgrove was dead, which showed a total absence of communication between 1905 and 1908.

Hill J., in delivering judgment, said: "I am satisfied that Lavinia Musgrove had entirely forgotten the document bearing her signature, and that it in no way represents her testamentary wishes at the time of her death. But if it was a will it was not revoked, and the question remains whether it was her will in 1890. The onus of proof is upon the plaintiff. He has proved the signature of Lavinia Musgrove, and also the signatures of the witnesses against a filled in attestation clause. The operative part of the will is all on one page above the signature of Lavinia Musgrove. The evidence showed that Lavinia Musgrove was a businesslike woman. All these matters are strongly in favour of the document being a will. On the other hand, the sole beneficiary was the daughter of Emma Mercy Dunmall, who was the sole executrix named in the document, and who signed as one of the witnesses. It was in her possession at her death in 1924, and cannot have come into her possession from Lavinia Musgrove after the death of Lavinia Musgrove in 1905. It is a fair inference that it had been in her possession all along. It is certain that at one time she knew of its existence and knew that it purported to be a will. Having regard to its form it is most unlikely that she did not know its effect, and if she knew of its effect, most unlikely that she should have forgotten its existence. In 1908 she knew of the death of Lavinia Musgrove, and she never did anything to prove the will or to secure the benefits to which her daughter was entitled. There was no suggestion that any ill will existed between Emma Mercy Dunmall and her daughter. These facts raise in my mind a strong suspicion that she, Emma Mercy Dunmall, knew there was something about the document which prevented her from putting it forward as genuinely the will of Lavinia Musgrove. The present case differs from cases like *Fulton* v. *Andrew* (1) and *Tyrrell* v. *Painton.* (2) In those cases some facts about the execution of the will were proved by evidence. Here no one is alive who knows anything about the document, either as to how it came into existence in 1890, or anything about it until 1925. In those cases the suspicion was excited by the known facts attending the execution of the document, Here the suspicion is excited by facts subsequent to the apparent execution—namely, that the person who had possession of the document did nothing for sixteen years after knowledge of the death of the deceased, though she had the strongest motives for prompt action. In *Tyrrell* v. *Painton* (3) Lindley L.J. said that the rule in *Barry* v. *Butlin* (4); *Fulton* v. *Andrew* (1); and *Brown* v. *Fisher* (5) applied whenever circumstances which excite the suspicions of the Court exist and whatever their nature may be. Here my suspicion is excited. What follows? In those cases the plaintiff had to prove knowledge and approval, due execution of the will not being in dispute. But does not the same principle apply also to the fact of due execution? Suspicion being excited, ought the Court to be content to say Omnia praesumuntur rite esse acta? I think not. I think that in such circumstances it is for the plaintiff to prove affirmatively that the document propounded was the will of Lavinia Musgrove expressing her real mind and duly executed as her will. That the plaintiff cannot do, and nobody can do it. I think, therefore, that the case fails, and there will be judgment for the defendant."

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(1) (1875) L. R. 7 H. L. 448.
(2) [1894] P. 151.
(3) [1894] P. 151, 157.
(4) (1838) 2 Moo. P. C. 480.
(5) (1890) 63 L. T. 465.

The plaintiff appealed. The appeal was heard on May 16 and 17, 1927.

G. C. Tyndale and *R. G. Wavell-Paxton* for the appellant. The question of substance for the decision of the Court is whether the will of Lavinia Musgrove is a good will. The learned judge has found that the signatures of the testatrix and of the attesting witnesses were their respective signatures, but was unable to find in whose handwriting the body of the will was.

[Lawrence L.J. Does anything turn on that?]

We are content that the case should be decided on the basis that it is not known in whose handwriting the will is. The judge has based his decision on the ground that the fact that the executrix kept the will in her possession for sixteen years after the death of the testatrix created a suspicion that she did not believe that it was properly executed.

[Lord Hanworth M.R. It is a remarkable circumstance that the executrix who knew of the death of the testatrix in 1905 should have taken no steps under her will of which she was executrix and which was made in favour of her daughter.]

The probability is that she had forgotten all about it. There is no evidence that when the executrix attested the will she knew its contents. It is submitted that nothing done by a third party subsequently to the execution of a will can affect its validity. Here both of the attesting witnesses are dead, and the plaintiff must rely on the maxim: Omnia praesumuntur rite esse acta. We do not contend that when Lavinia

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Musgrove died in 1905 the will represented her intentions. Hill J. largely based his decision on passages in the judgment of Lindley L.J. in *Tyrrell* v. *Painton* (1), but there was here no evidence of any suspicious circumstances at the time of the execution of the will. The generality of the observations of Lindley L.J. in that case ought to be confined to the facts of that case. See also *Guardhouse* v. *Blackburn.* (2) The onus of proving a will being on the party propounding it, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of an assent to its contents will be presumed: *Barry* v. *Butlin.* (3) See also *Harris* v. *Knight* (4); *Fulton* v. *Andrew.* (5) There is always a strong presumption in favour of testacy rather than intestacy.

[LORD HANWORTH M.R. The doubt that Hill J. had arose from the fact that no use was made of the will for sixteen years.]

There was very little suspicion about this case. Having regard to *Harris* v. *Knight* (4) we cannot put our case as high as to say that in no circumstances can what has been done by third parties subsequent to the execution of the will be material. But here the fact that the mother knew that her daughter would largely benefit under the will can have little effect on the question of its execution.

[LORD HANWORTH M.R.: Why did the mother do nothing for sixteen years?]

She had either forgotten the existence of the will or had received some intimation from the testatrix that she no longer intended to be bound by it. It does not follow from the fact that the mother was an attesting witness that she read the will.

[LAWRENCE L.J. What puzzles me is, how can the action of the mother affect the interest of the daughter?]

Lloyd v. *Roberts* (6) shows how strong the presumption, omnia rite esse acta, is in a case where the will appears to have been properly executed.

(1) [1894] P. 151, 156, 157.
(2) (1866) L. R. 1 P. & M. 109.
(3) (1838) 2 Moo. P. C. 480.
(4) (1890) 15 P. D. 170.
(5) L. R. 7 H. L. 448.
(6) (1858) 12 Moo. P. C. 158.

[SARGANT L.J. I do not see why the conduct of a third party subsequent to the execution of a will should affect the question of the knowledge and approval of the testatrix to the contents of her will.]

It is submitted that the decision of Hill J. was wrong and ought to be reversed.

Cotes-Preedy K.C. and *Noel Middleton* for the respondent. The onus is on the plaintiff to show that all the requirements of a valid will have been satisfied. The fact that the names of the attesting witnesses appear in the attestation clause does not prove that the witnesses were present together at the same time. There is no evidence to satisfy the Court that the document was as it now appears when the testatrix signed it. The will here did not come from proper custody. If a will is not in the possession of a testator at the time of his death, the Court will presume that he destroyed it animo revocandi. Here it is submitted the circumstances of the case take it out of the presumption omnia rite esse acta: *In the Goods of Peverett.* (1) The judge has held that the will did not represent the wishes of the testatrix at her death, and stricter proof of its due execution is therefore necessary: *Tyrrell* v. *Painton.* (2)

[SARGANT L.J. The question whether the will expressed the meaning and intention of the testatrix at the date of her death has nothing to do with the matter. The question is whether it expressed the meaning and intention of the testatrix at the date of its execution.]

The question is one of fact. There is no case precisely in point. How was it that the testatrix did not retain the will in her own possession? The fact that she did not do so gives rise to suspicion. The dictum of Lindley L.J. in *Tyrrell* v. *Painton* (2) goes, it is submitted, beyond the requirement of proof of the knowledge and approval of the contents of the will by the testatrix and of her soundness of mind and extends to removing suspicion.

The Court has here to determine two questions, both of which are questions of fact: (1.) Was the will duly executed? and (2.) Did the deceased know and approve of its contents? To determine these questions the Court must look not only at the will, but at all the circumstances of the case. The onus of proving a will being on the party propounding it, it is in general discharged by proof of capacity, and the fact of execution, from which knowledge and assent to its contents will be presumed: *Barry* v. *Butlin.* (1) Here the burden being on the plaintiff, the evidence adduced by him is of a very limited nature. He has the document, and has proved the signature of Lavinia Musgrove and the signatures of the two attesting witnesses, and that the two attesting witnesses are dead. That, however, does not carry him very far.

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(1) [1902] P. 205.

(2) [1894] P. 151, 157.

[SARGANT L.J. What more is available to the person seeking to prove?]

In all the cases in which the Court has acted on the presumption omnia rite esse acta there has been something more that has satisfied the Court aliunde that the will produced was intended by the deceased to be his will. Here, although the will contains the signatures of the testatrix and the attesting witnesses, there is no evidence as to the circumstance under which they were put on the document. The question is whether the Court is entitled to draw the inference that at the time the signatures were put on the instrument was a completed instrument.

[LORD HANWORTH M.R. referred to the Wills Act, s. 20.]

Where the will is a holograph will, that establishes at once that the contents were known to the testator. So, too, where one of the attesting witnesses is a solicitor, that establishes the fact that the will was duly attested. There are only two instances of proof beyond the mere production of the instrument. There have been numerous cases in the Probate Court in which the document has been signed first and filled up afterwards. In *Wright* v. *Sanderson* (2), where the Court presumed the due execution of a codicil, all the parties were present for the purpose of signing the codicil and there was an undoubted attempt to execute it. In all these cases the

(1) 2 Moo. P. C. 480, 484.

(2) (1884) 9 P. D. 149.

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Court has insisted that regard must be had to all the circumstances of the case, and has never assumed all the facts without evidence aliunde: *In the Estate of Strong.* (1) And in all of them there has been something more than the mere production of the document with the signatures.

In *Lloyd* v. *Roberts* (2) the will was entirely in the handwriting of the testator. One of the witnesses deposed that when he signed the will it was in blank. There it was undisputed that the three persons were present for the purpose of executing the will. The presumption there was strengthened by the fact that the testator was a solicitor in large practice.

Harris v. *Knight* (3) shows: (1.) the circumstances in which the presumption may be said to arise, and (2.) the weight to be attached to it. In that case both the attesting witnesses were dead.

In *Wyatt* v. *Berry* (4) Gorell Barnes J. states what he considers to be the effect of *Wright* v. *Sanderson* (5) and *Lloyd* v. *Roberts.* (2)

Vinnicombe v. *Butler* (6) shows that before the presumption is allowed to have any real force the Court will require to have it established as a fact that the testator intended to execute a will.

In the Goods of Peverett (7) shows the circumstances in which the Court relies on the presumption. The document in that case was a holograph will.

In *Wright* v. *Rogers* (8) the Court declined to act on the recollection of a surviving witness that the will was not duly attested and decreed probate of the will as duly executed.

In *Burgoyne* v. *Showler* (9) the facts were very strongly in favour of the presumption which the Court was asked to draw. The will there was produced from proper custody.

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(1) [1915] P. 211.
(2) 12 Moo. P. C. 158.
(3) 15 P. D. 170, 179.
(4) [1893] P. 5, 9.
(5) (1884) 9 P. D. 149.
(6) (1864) 3 Sw. & Tr. 580.
(7) [1902] P. 205.
(8) (1869) L. R. 1 P. & M. 678.
(9) (1844) 1 Rob. E. 5, 9.

Woodhouse v. *Balfour* (1); *Byles* v. *Cox* (2); *Whiting* v. *Turner* (3) were all cases of holograph wills.

In determining the question before the Court the Court must not rely solely on the presumption omnia rite esse acta. That presumption, it is submitted, was invented for the purpose of enabling the Court to indulge its leaning in favour of testacy rather than intestacy. The Court will not use the presumption where to do so would be inequitable. It must consider all the facts and determine what is the reasonable probability. The presumption here would have had very great weight if the will had been produced from a bureau belonging to the deceased. It is a remarkable fact that if Lavinia Musgrove executed this document as a will she should have forgotten its existence, and still more remarkable that Emma Mercy Dunmall, whose daughter took under it, should have forgotten it.

[Lord Hanworth M.R. We come back to the one point. Was this ever a will? If it was it continued to be so.]

The respondent cannot put his case higher than that this is a case of non-proven.

Hill J. had all the facts before him and, it is submitted, has come to the only right conclusion that could be come to.

Tyndale replied.

Cur. adv. vult.

June 2. The following written judgments were delivered:—

Lord Hanworth M.R. This is an appeal from a considered judgment of Hill J. delivered on April 12, 1927. The learned judge found it a very difficult case, and one upon which he could not find any direct authority. I share his view as to the difficulty of the case.

The will that is propounded is one dated September 9, 1890, and Lavinia Musgrove, the testatrix, died on March 16, 1905. The will was found in a desk belonging to the mother-in-law of the plaintiff, Emma Mercy Dunmall, who died on April 12, 1924. She was named as an executrix in the will, and her daughter, Agnes Maria, who was married to

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(1) (1887) 13 P. D. 2.
(2) (1896) 74 L. T. 222.
(3) (1903) 89 L. T. 71.

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the plaintiff, and died on October 16, 1925, was the sole beneficiary under the will. The facts relating to the testatrix and her family, and their circumstances, which are related by Hill J., need not be repeated here.

It is a surprising fact that the will was not brought to light in the lifetime of Emma Dunmall, who was in need of monetary help, and during whose lifetime her daughter and her husband, the plaintiff, sought to alleviate her condition, and actually applied to Alfred Musgrove, the brother of Lavinia Musgrove, for assistance, which was refused. Alfred Musgrove died in July, 1924. There was evidence before Hill J. that some ten days before her death Lavinia had said to her brother that they ought to be thinking of making their wills. That thought was not carried into effect by any will of that date, and letters of administration were granted to her brother, Alfred Musgrove, on May 9, 1905, of the estate of his sister Lavinia, who was supposed to have died intestate. That administration was almost, but not quite, completed, at his death on July 31, 1924, and letters of administration de bonis non to the estate of Lavinia Musgrove were issued on March 13, 1925, to Lily Mayhew, who is the sole beneficiary under Alfred's will.

The mere statement of these dates and facts is sufficient to prove that it is surprising and curious that the will of Lavinia was not brought to light till June, 1925—fully twenty years after she had died, and seventeen years after those interested knew of her death.

The learned judge heard the evidence and saw the witnesses. His conclusions were as follows:—

The will is complete in form. All the signatories to it are dead, but their signatures have been duly proved. He is unable to say aye or nay whether the handwriting in the body of the will is that of Lavinia Musgrove, and he adds: "I am satisfied that Lavinia Musgrove had entirely forgotten the document bearing her signature, and that it in no way represents her testamentary wishes at the time of her death. But it was a will, it was not revoked, and the question remains whether it was her will in 1890."

The will was found in a desk belonging to the executrix appointed under it. Hill J. says it is a fair inference that it had been in her possession all along.

The learned judge finds that suspicion was excited in his mind that there was something about the document which prevented Emma Mercy Dunmall, the executrix, from putting the will forward as the genuine will of Lavinia Musgrove, and he reached his conclusion against the plaintiff on the ground that the onus lay upon the plaintiff to remove that suspicion; that the maxim Omnia praesumuntur rite esse acta alone could not be relied upon, and was not sufficient for that purpose.

I need hardly say that I have considered the judgment of Hill J. most carefully and have accepted the facts found by him which I have referred to: but, not without diffidence, I have felt unable to agree with his decision on the law applicable to the facts.

Lavinia Musgrove was a good business woman. The document found to have been signed by her bears in its first line, and in bold black type: "This is the last will and testament." Attached to the will are a series of instructions, simply expressed, as to how to make and execute a valid will, with a clause as to due attestation. That document is found duly signed and attested. There cannot be any doubt in my mind that the document was signed and attested by Lavinia Musgrove with the intention that it should be her last will.

The will was made in the lifetime of her father at a time when her estate was not so large as it afterwards became, and in favour of a child of a cousin who was not a credit to her relations and had the burden of this illegitimate daughter, then ten years old, and who, perhaps not unjustly, might be the object for womanly sympathy and charity.

The will was placed in the custody of the mother and executrix. There is no suspicion attaching to the will itself, or to its terms. If the will had been produced immediately upon the death of Lavinia in 1905, no exception could have been taken to it.

The suspicion that the judge refers to is a suspicion as to the conduct of Emma Mercy Dunmall and her forbearance to put the will forward. But if the will was once a good will it cannot be disposed of except in one of the authorized ways of revocation: see ss. 18, 19 and 20 of the Wills Act.

When I attempt to analyze the suspicion aroused it seems to me that it arises from a disinclination to accept the will, upon a survey of the circumstances of Lavinia at the time of her death, or of later facts.

If it was once a will, and as such was handed over to the custody of the executrix—and no more effective act could be done by a testatrix in support of it—it remains her will, and no mere conduct of the executrix subsequently will stop its effect. The judge was satisfied that Lavinia had entirely forgotten the document. Forgetfulness—even if surprising —may explain the inaction of Emma Mercy Dunmall. To import more into this inaction appears to me to be acting upon a presumption arising from conjecture only.

It is necessary now to consider the authorities which have been brought to our attention in the careful arguments of counsel on both sides, and the rules which have been laid down and must be followed.

It is clear, first, that the onus of proving a will lies upon the party propounding it, and, secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this last rule a little further—he must show that the testator knew and approved of the instrument as his testament and intended it to be such.

Parke B. in the course of his judgment in *Barry* v. *Butlin* (1) says: "The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed."

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(1) 2 Moo. P. C. 480, 484.

This part of his judgment is expressed by Parke B. to have been drawn up for the purpose of laying down general rules upon a subject of great practical importance after the Wills Act had come into force, and to have had the concurrence of all the judges who had been sitting with him.

In *Burgoyne* v. *Showler* (1) Dr. Lushington said: "Upon what principle ought the Court to consider a case of this description, where the will upon the face of it appears to be duly executed—where there is an attestation clause, though not quite in the strict form? I apprehend, in the first place, the presumption is, 'omnia rite esse acta.' If the party is put on proof of a will he must examine the attesting witnesses. On the present occasion there are two subscribed witnesses; if these persons were dead, the law would presume the will to be duly executed; if they were utterly forgetful of all the facts the presumption of law would be the same."

It is noteworthy that in that case the judge pronounced for the will in spite of the evidence of the attesting witnesses, and decided the case upon the presumption arising in favour of a will which had been attested by two witnesses, but not fully in accordance with the Act, and upon no other evidence. There was no intrinsic evidence in favour of the will, such as being the holograph of the testator. The presumption carried the will to probate, although there were alterations and obliterations in the body of it.

In *Lloyd* v. *Roberts* (2) Dr. Lushington followed the same course, and gave weight to the presumption of law, though he negatived thereby the evidence of the one surviving witness. There was, however, in that case the fact that the testator was a solicitor and the will was in his handwriting. There was, therefore, intrinsically a strong probability that a professional man would have seen to it that his holograph will was properly attested.

In *Vinnicombe* v. *Butler* (3) the presumption was held to prevail in a case where there was an incomplete attestation clause. Three out of the four attesting witnesses remembered

(1) 1 Rob. E. 5, 10.
(2) 12 Moo. P. C. 158.
(3) 3 Sw. & Tr. 580.

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nothing about the matter, though the fourth deposed that she was asked to sign a will and gave some evidence as to how it was done. Sir James Wilde in his judgment said (1) that the presumption omnia rite esse acta applied with more or less force according to the circumstances of the case, adding that "When there is a regular attestation clause, with the names of two witnesses appended thereto, leading to the conclusion that the will was executed by a person who knew the requirements of the Wills Act, the principle applies directly, and it may be presumed that the will was duly executed, and the mere failure of memory of the witnesses will go for nothing."

In *Guardhouse* v. *Blackburn* (2), Sir James Wilde, "after much consideration," declared certain propositions as rules which since the Wills Act, 1837, ought to govern the action of the Court in respect of a duly executed paper. The first two are applicable to the present case. "First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents."

In that case probate was granted of the will as it stood, although the attorney who prepared it stated that there were words in it, inserted by inadvertence, and contrary to the instructions given for its preparation—a strong case for establishing that a testamentary document is entitled to probate as it stands and cannot be altered by testimony and criticism.

In *Wright* v. *Sanderson* (3) the principle of *Burgoyne* v. *Showler* (4) and *Lloyd* v. *Roberts* (5) was adopted and followed in the Court of Appeal by Lord Selborne and Cotton and Fry L.JJ. Cotton L.J. said (6): "If the attesting witnesses were both dead, then, on proof of their handwriting, the

(1) 3 Sw. & Tr. 582.
(2) L. R. 1 P. & M. 109, 116.
(3) 9 P. D. 149.
(4) 1 Rob. E. 5.
(5) 12 Moo. P. C. 158.
(6) 9 P. D. 149, 161.

codicil would, if there were no other evidence, be admitted to probate, not only on the presumption omnia rite esse acta, but in consequence of the presumption that what was stated, in the clause immediately above the signature of the witnesses, to have been done in their presence, had in fact been so done": and Fry L.J. said (1): "The codicil propounded is ex facie perfectly regular as regards all the formalities of signature and attestation. The presumption omnia rite esse acta, therefore, applies to the codicil."

Woodhouse v. *Balfour* (2) is another illustration to the same effect, and *In the Goods of Peverett* (3) another. The latter is a striking, indeed a startling decision, for there was no attestation clause whatever: it was distinguished in *In the Estate of Strong.* (4)

Fulton v. *Andrew* (5) was also cited to us. Lord Cairns (6) protested against rules cited being considered as unyielding; and Lord Hatherley (7) calls attention to the rule that when a party writes out a will under which he takes a benefit, that is a circumstance which ought to excite suspicion, and that the Court ought not to pronounce in favour of the instrument until the suspicion is removed; but he also affirms the presumption in favour of an instrument duly executed. The case, however, has but little bearing upon the facts of the present.

In *Harris* v. *Knight* (8) Lindley L.J. refers to the maxim "Omnia praesumuntur rite esse acta" as "an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability." The facts as to the making a will, its execution and attestation, and its contents, must be proved, but upon those proved facts the maxim operates.

The facts in the present case appear to establish that this business woman must have signed the instrument in the form it is, for the purpose of making her will. The attestation appears in order, the contents appear from the writing and

(1) 9 P. D. 163.
(2) 13 P. D. 2.
(3) [1902] P. 205.
(4) [1915] P. 211.
(5) L. R. 7 H. L. 448.
(6) Ibid. 460.
(7) Ibid. 471.
(8) 15 P. D. 170, 179.

ink used to be an original part of the instrument, and in accordance with the rules and reasoning in the cases above set out, ought not the maxim to be held to apply to prove that she knew and approved of its contents? What of the suspicion? It is not such as attaches to the document itself in the sense in which Sir James Wilde uses the term in *Guardhouse* v. *Blackburn* (1), or as it arose in *Tyrrell* v. *Painton* (2) in the preparation of the will. The wide definition of suspicion stated by Lindley L.J. in the latter case (3), that it "extends to all cases in which circumstances exist which excite the suspicion of the Court," appears to have been used in reference to the preparation of the will, its intrinsic terms, and the circumstances surrounding its preparation and execution, and Davey L.J. (4) seems to have had the same matters in mind. Their judgments were not intended to alter, but to affirm the principles laid down in the cases I have cited. They do not alter what Lindley L.J. said in *Harris* v. *Knight*. (5)

After carefully considering the authorities and following the rules stated in *Barry* v. *Butlin* (6) and *Guardhouse* v. *Blackburn* (1), I am of opinion that the plaintiff is entitled to have the maxim applied in favour of this document, complete in form, unexceptional in purpose, about which no suspicion can be aroused until a later date, and that not attaching to the will, or to the testatrix, but to the executrix.

It is a suspicion that there must have been some condition subsequent, under which a valid testamentary document ceased to be effective. The onus of proof of this would appear to lie on the opponent of the grant of probate, for once the will has been proved to have been duly executed, the burden of proving that it was revoked lies on those who set up the revocation, and in the absence of evidence proving it, revocation will not be presumed. That is laid down by Lord Penzance in *Benson* v. *Benson*. (7)

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(1) L. R. 1 P. & M. 109, 116.
(2) [1894] P. 151.
(3) Ibid. 157.
(4) [1894] P. 159.
(5) 15 P. D. 170, 179.
(6) 2 Moo. P. C. 480.
(7) (1870) L. R. 2 P. & M. 172, 174.

It was argued that the presumption is of no effect unless there are facts, intrinsic or ab extra, showing that there was an intention to make a testamentary document, and that its only use is to enable the Court to overcome the technical difficulties of proof, when satisfied, aliunde, that the inference ought to be drawn that all is in order. After consideration of the cases referred to, that argument appears to me to present too wide a proposition. It is too wide to accord with the words of Parke B. that I have quoted above. But even if it is taken as correct, the facts of the present case, a document, obviously testamentary, executed by a good business woman, present sufficient internal evidence of knowledge and approval when the will was executed. The suspicion arises at a later date when the will had begun to run its course as an effective instrument.

The maxim, in my judgment, operates in favour of the will after the proof given of the execution and attestation, to establish that the testatrix knew and approved of its contents.

The appeal must be allowed and judgment must be given pronouncing for the will.

SARGANT L.J. In this case the plaintiff has succeeded in proving to the satisfaction of the Court the signature of the alleged testatrix and of the two alleged witnesses on the document propounded by him as a will. Furthermore, the document is prominently described on its face as a will, and purports to have been signed and witnessed in the manner prescribed by the statute as essential for the purpose of constituting a will. Accordingly on the principles established in earlier cases and summarized in the leading case of *Wright* v. *Rogers* (1) the plaintiff has satisfied the onus prima facie resting on him, and the presumption is that, apart from countervailing circumstances, the document is in fact the will of the alleged testatrix, Lavinia Musgrove.

Further, there is nothing, in my opinion, in the circumstances in which the document was discovered or in the dispositions made by it to cast any suspicion on its authenticity.

(1) L. R. 1 P. & M. 678.

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To confide a will to the sole executrix who was also the mother of the universal legatee thereunder, an infant of some ten years of age, was a very natural act. And I see no improbability at all in a gift of the testatrix's property in favour of an infant who was illegitimate, but had been recognized as a relation by the testatrix. The unfortunate position of the infant, especially in view of her mother's recurrent impecuniosity, may well have evoked the testatrix's compassion.

Mr. Middleton for the defendant urged that at the date of the alleged will the testatrix was living with her father and brother at Deptford, and that at that time she had only a comparatively small property of her own not exceeding 2000*l.*; and these facts, though not actually proved, were accepted by Mr. Tyndale for the appellant, and no doubt had been common ground at the trial. But so far as these facts are relevant at all (and I attach little importance to them) they seem to tell rather in favour of the appellant than against him. For the smallness of her then property would make it the more natural for Miss Musgrove to give the whole of it to the infant. And the argument that the gift to the infant of the much larger sum that Miss Musgrove possessed at her death would probably not have represented her wishes at the death, though much relied on by Mr. Cotes-Preedy, seems to me of no importance, and is rightly rejected by the learned judge. The only date at which her testamentary intentions are to be regarded is, of course, the date on which the document was executed.

The sole ground on which the learned judge has pronounced against the will is the suspicion excited in his mind by the circumstance that the executrix, realizing (as she must have done) the effect of the will, knowing by the year 1908 at latest of the death of Miss Musgrove three years before, and being on good terms with her daughter, did nothing during the remaining sixteen years of her own life to secure these benefits for her daughter. And he deduces from this that the executrix must have known something about the document which prevented her from putting it forward as a genuine will of Miss Musgrove, that is, something which either prevented the document from expressing the real mind of the testatrix or which affected the due execution of the document as a will. In these circumstances he considers that the plaintiff has at least to bring further affirmative evidence to prove the facts of due execution and of expression of real intention; and as this is impossible, he pronounces against the alleged will. In so holding he relies on the principles of *Tyrrell* v. *Painton* (1), summarizing and following certain earlier cases to the same effect, though he recognizes that there are differences between those cases and the present.

With great respect to the learned judge I am of opinion that the principle of the cases in question does not apply in the circumstances of the present case. That principle is most neatly expressed in the judgment of Davey L.J., which is not in any way inconsistent with that of Lindley and A. L. Smith L.JJ., but has the advantage of incorporating a little more definitely all the conditions of the problem the Court was solving. He says (2): "It must not be supposed that the principle in *Barry* v. *Butlin* (3) is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things that raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed." Now here there is nothing in the preparation or contents of the will to raise a suspicion that it did not express the mind of the testatrix. The sole peculiarity is the subsequent fact that for many years after knowledge of the death of the testatrix the executrix did not take any steps to prove a will which gave large benefits to her daughter. I cannot think that this fact is analogous to the facts in *Tyrrell* v. *Painton* (1) or the previous similar cases, or that it justifies such an inference as was drawn there.

The learned judge in attributing the inaction of the executrix to knowledge of some defect in the document was, in my judgment, conjecturing only. And I do not think it difficult to suggest a good many reasons for her inaction which are at least as probable as that adopted by the learned judge and would not invalidate the will. The executrix may have been told by the testatrix at the time of her will or have thought that her intention was only to benefit the legatee if she was a minor or unprovided for at the death of the testatrix. But any such intention, even if communicated, would not in law invalidate or affect the will. Or the executrix may, like the testatrix, have forgotten altogether the existence of the will. Or on the occasion of the marriage of the legatee the testatrix may have communicated to the executrix an intention to revoke the will, which again would be quite ineffective. And even if the executrix thought that there had been some informality in the execution or attestation of the will, as, for instance, if she had forgotten altogether that she had witnessed the will, there are several cases to show that this would not be sufficient to rebut the presumption arising from the form in which the will was witnessed: *Wright* v. *Sanderson* (1); *Lloyd* v. *Roberts.* (2) The executrix must be regarded for this purpose as merely a witness. The beneficial interest under the will was not that of the executrix, but that of her daughter.

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(1) [1894] P. 151.
(2) [1894] P. 159.
(3) 2 Moo. P. C. 480.

In my judgment, therefore, the appeal should be allowed and the will pronounced for with such costs here and below as are appropriate in a poor person's case.

Lawrence L.J. The question which falls to be determined on this appeal is whether in the special circumstances of this case the presumption omnia rite esse acta ought, or ought not, to prevail. If the presumption is held not to prevail the will cannot be admitted to probate, as both the attesting witnesses are dead and the only available evidence has been given.

The will was made on a printed form, which contained not only a regular attestation clause, but also precise instructions

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(1) 9 P. D. 149.

(2) 12 Moo. P. C. 158.

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as to the manner in which it ought to be executed so as to comply with the requirements of the Wills Act.

The signatures of the testatrix and of the attesting witnesses have been duly proved.

The testatrix was a business woman. There is some doubt whether she actually filled in the form herself; but even if she did not, there is nothing to suggest that she did not understand and approve of the contents, which are short and perfectly simple. Nor is there any reason to suppose that she did not read the instructions and make herself acquainted with the proper method of executing the will. Moreover, there is no suggestion of fraud or undue influence. The sole beneficiary named in the will was Agnes Maria Dunmall, the ten year old illegitimate daughter of the testatrix's cousin, Emma Mercy Dunmall. The testatrix, who was living at home with her father and brother (both of whom were well off), had some property of her own, which we are told was given to her by her father. She was on friendly terms with her cousin, who was in humble circumstances, and it is quite natural that she should have become attached to her cousin's daughter and have determined to make a will in her favour.

Had the will been found in the possession of the testatrix at her death, and had the attesting witnesses been then dead, it is not disputed that on proof of the signatures of the testatrix and of the attesting witnesses the presumption omnia rite esse acta would have applied, and the will would have been admitted to probate without any further evidence.

It is contended, however, that as the will was not discovered until twenty years after the death of the testatrix, and as it was then found in a desk which had belonged to Emma Mercy Dunmall, the presumption ought to be held to be inapplicable. Hill J. has accepted this contention, and has withheld probate.

The grounds upon which the learned judge has arrived at this conclusion are that the will was not produced from proper custody, and that Emma Mercy Dunmall, in whose custody it was, did not disclose it when she heard of the

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testatrix's death. The learned judge held that these circumstances were of such a nature as to raise in his mind a strong suspicion that Emma Mercy Dunmall knew that there was something about the document which prevented her from putting it forward as genuinely the will of the testatrix, and consequently that it could not be admitted to probate without strict proof of its due execution.

Of the cases cited during the argument, those in which the sole question was whether the presumption omnia rite esse acta ought to prevail in the face of evidence given by the attesting witnesses tending to show that the formalities required for the due execution of the will had not in fact been observed do not, in my opinion, afford much assistance in solving the question which has arisen in the present case, except perhaps as showing the weight which the Court attaches to the presumption.

On the other hand, in every case in which the Court has had to consider whether, apart from the evidence as to the formal execution of the will, the circumstances were of such a nature as to arouse a well grounded suspicion that the alleged will did not in fact represent the testamentary wishes of the testator at the time when the document was signed, the suspicious circumstances have been circumstances existing at the time of and surrounding the preparation and execution of the will; one of the most common circumstances being that the person benefiting by the will has prepared it and has procured its execution. Although Lindley L.J. in *Tyrrell* v. *Painton* (1) points out that the rule that the onus of proving that the testator knew and approved of the contents of the will lies upon the party propounding the will is not confined to such a case as I have last mentioned, but extends to all cases in which circumstances exist which excite the suspicion of the Court, yet, in my opinion, the circumstances which the learned Lord Justice had in mind were primarily circumstances existing at the time when the alleged will was executed and having a direct bearing on the question whether the testator then knew and approved of its contents.

(1) [1894] P. 151, 157.

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In the present case the matters which have excited the suspicion of the learned judge are matters which occurred only after the execution of the will. Subsequent events may in some cases no doubt give rise to a suspicion that the will was not properly executed or that the testator did not know or approve of the contents, but in the present case the facts relied upon by the learned judge are not, in my opinion, of such a nature as to form a good ground for any such suspicion.

Having regard to the fact that Emma Mercy Dunmall was the executrix named in the will and the mother and natural guardian of the sole beneficiary, I do not consider it at all unnatural that she should have been entrusted by the testatrix with the custody of her will, especially if, as is not improbable, the testatrix did not want her father or brother to know that she had made it.

The reasons which induced Emma Mercy Dunmall not to tell her daughter of the will and not to put it forward on the death of the testatrix are less easy to conjecture, but I do not agree with the learned judge that, in the circumstances, this secrecy and this non-disclosure on the part of Emma Mercy Dunmall create a suspicion that the will was not duly executed or that the testatrix did not know or approve of its contents when she signed it.

It is possible, although not very likely, that Emma Mercy Dunmall may have forgotten the will. Assuming she had not forgotten it, it is possible that the will was handed to her by the testatrix under a pledge of secrecy, and on a condition that it was to become inoperative and not to be put forward by her unless the testatrix died within a given time or before the happening of some event, such as the coming of age or the marriage of the infant beneficiary. If this be the true explanation it would also account for the statement made by the testatrix to her brother in the year 1905 that it was time he and she were thinking of making their wills. It may well be that neither the testatrix nor Emma Mercy Dunmall realized that, unless duly revoked in accordance with the provisions of the Wills Act, the will would remain effectual.

Be that as it may, however, and bearing in mind that there is nothing on the face of the will to suggest that it was otherwise than regularly executed, and that neither its contents nor the known circumstances surrounding its preparation and execution give rise to any suspicion of fraud or undue influence, I am of opinion that the mere absence of evidence explaining why the testatrix handed her will to Emma Mercy Dunmall, and why the latter did not disclose it at the proper time, does not furnish an adequate ground for suspecting that the will was not properly executed or that it did not represent the testamentary wishes of the testatrix at the time it was made.

Under these circumstances I have come to the conclusion that in the present case the presumption omnia rite esse acta has not been rebutted and ought to prevail. I therefore agree that the appeal succeeds and that the Court should pronounce for the will.

Appeal allowed.

Solicitors for appellant: *Scott, Bell & Co.*

Solicitor for respondent: *E. F. Hunt, for Farrington & Winterton, Brighton.*

W. I. C.

Distinguished. In re St. Saviour's, Walthamstow [1951] P. 147

Explained and Distinguished. Re St. Peter, St. Helier, Morden. *Re* St. Olave, Mitcham. [1951] 2 All E.R. 53.

[IN THE ARCHES COURT OF CANTERBURY.]

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June 20, 21.

ON APPEAL FROM THE CONSISTORY COURT OF ST. EDMUNDSBURY AND IPSWICH.

THE RECTOR AND CHURCHWARDENS OF CAPEL ST. MARY, SUFFOLK *v.* FRANK VICTOR PACKARD.

Distinguished. In re St. Peter St. Helier, Morden [1951] P. 303

Ecclesiastical Law—Faculty—Removal of illegal Ornaments—Second Holy Table—Candlesticks on Retable exceeding Two—Candlesticks on Credence used Ceremonially—Candelabra used in Service of Adoration of the Sacrament—Image of Blessed Virgin Mary—Tabernacle—Sacring Gong—Censer used Ceremonially—Stations of the Cross—Holy Water Stoup—Hanging Lamp in Chancel—Articles not properly Subject-matter of Faculty—Books displayed in Church—Notices as to Times for Confession—Confessional Stool—Books of Devotion on Holy Table—Notices asking Prayers for the Dead—Confirmatory Faculty—Crucifixes—Veneration—Undertaking by Rector—Conditions—Admissibility of Memorials.

A suit was brought in a Consistory Court for the removal of certain articles from a parish church on the ground that they were either illegal ornaments or that they were only required for use in services contrary to the doctrines of the Church of England. The Rector and Churchwardens appeared in opposition, and asked that the petition should be dismissed and that a confirmatory faculty should be granted in respect of any articles which required such authorization. The Chancellor granted a confirmatory faculty for some articles and a faculty for the removal of others. The respondents appealed in respect of the articles ordered to be removed:—

Held, affirming the decision of the Consistory Court, that a faculty ought to issue for the removal of a tabernacle, a sacring gong, four out of six candlesticks on the retable, two candlesticks on the credence which had been used ceremonially, a censer which had been used ceremonially, the Stations of the Cross, a second Holy Table introduced after a faculty for it had been refused, an image of the Blessed Virgin Mary with candles and vases, a holy-water stoup, two brass candelabra used in a service of adoration of the Sacrament, and a hanging lamp in the chancel used to denote the presence of the reserved Sacrament.

Held, further, reversing the decision of the Consistory Court, that a faculty ought not to issue for the removal of books and pamphlets displayed on tables in the church, notices as to times when confessions could be heard, notices asking for prayers for deceased persons, a kneeling stool used by persons making their confessions and the Rector's books of devotion on the Holy Table, but that these articles were not proper subjects for a confirmatory faculty.

Held, further, reversing the decision of the Consistory Court, that a faculty ought not to issue for the removal of a crucifix on the wall above the kneeling stool, used to assist the devotions of those making their

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confessions, and that a confirmatory faculty till further order ought to issue in respect of it.

Held, further, reversing the decision of the Consistory Court, that a faculty ought not to issue for the removal of a crucifix behind the Holy Table which had been proved to have been the object of veneration, the Rector having undertaken by his counsel not to genuflect to it or cense it, and not to allow any other officiating clergymen to do so, and that a confirmatory faculty till further order ought to issue in respect of it.

Memorials purporting to be signed by parishioners as to which no evidence is given in proof of the signatures or of the representations made to those who sign them are inadmissible in a faculty suit.

THIS was an appeal in a cause of faculty by the respondents below from a decision of the Chancellor of the Diocese of St. Edmundsbury and Ipswich (F. K. North, Esq.).

A petition was presented to the Consistory Court on August 10, 1926, by F. V. Packard, a parishioner, which prayed that a number of articles might be ordered to be removed out of St. Mary's Church, Capel St. Mary, Suffolk, and that the lectern in the said church might be removed from its existing to its original position. Citation issued, and the Rector of the parish (the Rev. J. H. M. Robertson) and the Churchwardens appeared in opposition, and pleaded (inter alia) that no grounds were alleged by the petitioner in support of the petition, that they were supported in their action by the Parochial Church Council, and that the figures on the rood-beam (which were included in the petition) were set up under the authority of a faculty dated October 7, 1911. They prayed that the petition might be dismissed, and that, if any of the articles named in the petition (other than the figures on the rood-beam) required a faculty for their authorization, a confirmatory faculty might issue in respect of them. The petitioner, in reply, alleged that all the articles other than the figures on the rood-beam had been placed in the church without a faculty, that some of them were illegal ornaments, and that the remainder were only required in connection with services and teaching contrary to the [doctrines of] the Church of England.

The cause was heard in Court by the Chancellor on divers days in 1926 and judgment was delivered on January 27, 1927.

The Chancellor held that a number of articles, whose removal was sought (including the figures on the rood-screen), were not illegal, and that such user as would justify their removal had not been proved. He granted a confirmatory faculty as to these (excepting the said figures), and they were not made the subject of any cross-appeal. But he granted a faculty to the petitioner for the removal of the following articles, for the reasons stated: Six candles on the retable of the altar and two on the credence table, because they were used for services and in a way contrary to the law of the Church of England; a censer, because incense was used ceremonially; fourteen pictures representing the Stations of the Cross, because they were illegal, and unauthorized services had been held with regard to them; a table in the south aisle covered with a linen cloth and with crucifix and candles upon it, because it was an altar (which the Rector denied) and had been placed there after a faculty for an altar in that aisle had been refused; an image of the Blessed Virgin Mary with two candlesticks and vases which had been placed on the lectern stand instead of the upper portion of the lectern, because it had been made the subject of superstitious reverence; notices in the porch asking for prayers for the dead, because, although prayers for the dead are not forbidden, prayers to assist the departed in purgatory are so, and the doctrine of purgatory was to be found in books placed in the church by the Rector, although he denied that he taught such doctrine; a holy-water bowl in the porch, because it was illegal; two brass candelabra on either side of the altar, because they were used in a service for the adoration of the Sacrament; a hanging lamp in the chancel, because it was used to indicate the reservation of the Sacrament; two books on the altar entitled "The Priest to the Altar" and "The Anglican Missal," because they contained unauthorized matter and he did not believe the Rector's denial that he used such matter in public worship; a tabernacle at the back of the altar, because it was illegal; a crucifix over the tabernacle, because it had been put to superstitious uses; a sacring gong in front of the altar, because it was illegal; two tables in the church with books and pamphlets on them, because the books contained teaching contrary to that of the Church of England, and some of them were improper and prurient; a kneeling desk or stool used by persons making their confessions, with a crucifix over it, and a notice board in the porch stating when confessions could be heard and announcing the service of compline, because they were part of the machinery of confession and were illegal, or inculcated the practice of habitual confession, which is illegal. The Chancellor also granted a faculty to the petitioner to restore the lectern to its original condition, and directed the respondents to pay the petitioners' costs, and the costs of the confirmatory faculty.

The Rector and Churchwardens appealed against so much of the order as directed the removal of the above mentioned articles.

1927. June 20. The appeal came on to be heard before the Dean of the Arches (SIR LEWIS DIBDIN, D.C.L.).

Sir Henry Slesser K.C. (with him *Edinger*) for the appellants. The decision of the Chancellor as to the removal of some of the articles in question in this case cannot be supported. It is less open to attack in respect of others, and in a few instances, as the law now stands, it is impossible to argue that the articles are legal.

The articles connected with the hearing of confessions should not have been ordered to be removed. The lawfulness of confession to a priest in the Church of England cannot be questioned, nor the duty of the priest to receive confessions. The kneeling desk in question is an ordinary piece of church furniture which could not be objected to if placed in any other part of the church. It is perfectly proper that arrangements should be made in the open church for hearing confessions. There is no question of a confessional box in this case. No suggestion is made that the crucifix has been venerated; it is there merely as an aid to the recollection and devotion of the penitant and, as such, it is completely covered by the decision in *Vincent* v. *Rector of St. Magnus-the-Martyr*. (1) The notice as to the times when confessions may be heard is lawful and unobjectionable, nor does it become censurable because of the announcement of the service of compline.

[THE DEAN OF THE ARCHES. As at present advised, the notice as to compline is quite immaterial.]

No objection to these articles could be sustainable unless the Rector had taught that confession was compulsory. This he emphatically denied; the evidence supports his denial, and there is no evidence whatever the other way.

[THE DEAN OF THE ARCHES. I ought to say at once that in my judgment the teaching of a clergyman is not an issue in a faculty suit, as, of course, it would be in a case of discipline. It cannot, it is true, be wholly disregarded, because it may throw light on the user or intended user of particular ornaments or furniture, but it is of the smallest possible relevance.]

The notice asking prayers for the dead should not have been ordered to be removed. It is unconnected, by itself or by any evidence, with any service whatever, and it is lawful. It was only objected to by the Chancellor because he held that the Rector held the Roman Catholic doctrine of purgatory. This he denied, and there is no evidence of it. The Chancellor proceeded upon his view of the contents of the books and pamphlets exhibited in the church. Many of these the Rector swore he had not read, and it was improper to deduce his teaching and beliefs from them. Moreover, not only does the tract on Purgatory by Doctor Darwell Stone, which was amongst them, repudiate the Roman Catholic doctrine of purgatory, but the whole of them have now been removed from the church and submitted to the Bishop, and only such as he approves will be restored.

[THE DEAN OF THE ARCHES. The Chancellor appears to have attributed an importance to these books and pamphlets which in any circumstances I should not have done. But as they have now been removed for submission

(1) [1925] P. 1.

to the Bishop, I do not, as at present advised, require you to address me upon them.]

But with respect to these notices, too much would be conceded if the appellants asked for a confirmatory faculty for them. Notices of this kind are not properly the subject-matter of a faculty. All that is asked is that the order for their removal should be set aside.

Upon the authorities it cannot be contended that all the six candlesticks on the retable can be retained. But the Chancellor has ordered the removal of them all. It is now generally recognized that two candlesticks on or behind the altar, which are lit before the celebration of the Holy Communion, whether required for the purposes of giving light or not, are permissible.

[THE DEAN OF THE ARCHES. It is not merely generally recognized; it is law.]

[*Wilfrid Lewis* said his clients had not asked below for the removal of more than four candlesticks, and he did not ask it now.]

[THE DEAN OF THE ARCHES. You need not address me further as to the retention of two candlesticks.]

It must be admitted that the two candlesticks upon the credence have in the past been used ceremonially, but, merely as they stand upon the credence, they are not unlawful and may be retained.

There was no justification for ordering the removal of the two tables on which books and pamphlets had been placed.

[*Wilfrid Lewis*. My clients never asked for this.]

The books upon the altar should be allowed to remain.

[THE DEAN OF THE ARCHES. If the interpolations in these books had been publicly used, it would be a very grave matter, even in a faculty suit. But the evidence does not show this, and I am not prepared to deal in a faculty suit with books which the Rector has upon the altar for purposes of his private devotions.]

What has been called "the second altar" was not and is not, in the Rector's view, an altar at all. It was the original Holy Table in the church, but has since been altered, and

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was placed in its present position by the Rector as part of a children's corner. Because the faculty for a second altar was refused he has carefully refrained from celebrating at it. He desires to retain it as part of the children's corner, and, with that object, will waive any claim to retain the candlesticks and, if the Court so requires, the crucifix.

As the law now stands, we cannot contend that the tabernacle is legal, but the Sacrament has been reserved in this church for some years and, as reservation will be legal if the Deposited Book becomes law, we ask that the order for the removal of the tabernacle may be suspended until this be determined, so that the practice of reservation may not be made impossible in this church on the eve of its legalization.

[THE DEAN OF THE ARCHES. In the tabernacle ?]

The Rector would be willing to reserve in an aumbry; difficulty arises because there is none at present, and we cannot ask for a faculty for one at the present stage of this suit. Moreover the proposed rules as to reservation do not confine reservation to an aumbry of necessity. If the Court be willing to suspend the order, the Rector is prepared to give an undertaking that nothing shall be done as regards the reserved Sacrament, which is not permitted by the Deposited Book. As to the crucifix above the tabernacle, the Rector absolutely denies that he has ever genuflected to it. He has genuflected to the reserved Sacrament. There may have been misapprehension as to this, but, if the tabernacle be removed, the crucifix is unobjectionable. The Rector is however prepared to undertake neither to genuflect to it nor cense it and not to permit other officiating clergy to do so.

It is admitted that a service has been used in connection with the Stations of the Cross, and that the presence of the three pictures for which there is no scriptural authority cannot be defended. The Rector is prepared to undertake that no such service shall be held hereafter and to remove the said three pictures. It is submitted that the rest may remain.

No service has been shown to have been used in connection with the image of the Blessed Virgin, and much less ceremonial than was proved in *Vincent* v. *Rector of St.-Magnus-the-Martyr*. (1) It is merely shown that the candles were lighted on Church festivals. The case as to veneration fails.

The hanging lamp is unobjectionable apart from reservation.

Wilfrid Lewis for the respondent. In such a case as this the teaching of the clergyman is not wholly irrelevant. It cannot be disregarded. The books and pamphlets were found by the Chancellor to contain doctrines contrary to those of the Church of England. For this and other reasons the Chancellor refused to accept the Rector's evidence as reliable. This was a finding of fact of great importance, and this Court ought to be bound by it.

[THE DEAN OF THE ARCHES. The Chancellor certainly came to this conclusion, and no doubt he had observed the Rector giving evidence as I have not. But it is not clear to me on what grounds he reached it.]

It is admitted that in the case of the crucifix above the confessional stool no case of veneration was proved. But the crucifix, the stool and the notice together constitute an apparatus for confession. Habitual confession is illegal: *Poole* v. *Bishop of London* (2); *Bradford* v. *Fry* (3); *Davey* v. *Hinde*. (4)

[THE DEAN OF THE ARCHES. *Poole* v. *Bishop of London* (2) is not in strictness an authority. It was an inquiry by the Archbishop of Canterbury as to whether the Bishop of London had properly exercised his discretion in revoking the licence of a stipendiary curate. It was decided very many years ago, and it is distinguishable from this case, as the Bishop's action was supported because the curate was held to have improperly advocated confession. In *Davey* v. *Hinde* (4) Doctor Tristram does no doubt speak of habitual confession as forming no part of the prescribed doctrine of the Church of England. By this I can only understand him to refer

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(1) [1925] P. 1.

(2) (1859) 5 Jur. N. S. 522.

(3) (1878) 4 P. D. 93.

(4) [1901] P. 95, 118–121; [1903] P. 221.

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to a practice whereby every one was required or expected to go to confession. I know of no authority which decides that a particular person may not go to confession habitually. Can you cite any ?]

None, save those already referred to.

[THE DEAN OF THE ARCHES. The Chancellor seems to have confused habitual with compulsory confession.]

In *Vincent* v. *Rector of St. Magnus-the-Martyr* (1) the Chancellor of the Diocese of London ordered the removal of a crucifix from the Rector's pew, as to which no case of veneration had been proved, because the pew was used as a confessional.

[THE DEAN OF THE ARCHES. Was there an appeal as to this crucifix ?]

No.

In this case the two pamphlets of questions which were proved contained questions on the breach of the Seventh Commandment of the same nature as those disapproved of in *Poole* v. *Bishop of London*. (2) The Rector said that if a confirmation candidate treated with disrespect or tore up the one applicable to children it would be a material element in his mind in determining the proper disposition of the child for confirmation.

[THE DEAN OF THE ARCHES. As to the pamphlet intended for adults you prove nothing but its presence in the church on the table of books and pamphlets, and I disregard it. The one intended for children was no doubt given to confirmation candidates, but it consists of questions for self-examination and has no necessary connection with confession. Any one having a cure of souls and responsible for preparing candidates for confirmation would put similar questions to them. He would fail in his duty if he did not. There is no evidence that the Rector refused to present for confirmation a candidate who did not go to confession.]

The notices asking for prayers for the dead are illegal. The evidence that the Rector taught the doctrine of purgatory arises from the books and pamphlets in the church.

(1) [1925] P. 1. Not reported in the Consistory Court. (2) 5 Jur. N. S. 522

[THE DEAN OF THE ARCHES. Is there any other evidence?] No.

Four of the candlesticks on the altar must be removed. The Rector's right to retain two is not disputed.

The candles on the credence table have been used ceremonially and cannot be retained. The books on the altar contain unauthorized matter, and are therefore illegal. It is admitted that no unauthorized service has been proved to have been read from them except the service of compline.

[THE DEAN OF THE ARCHES. It is repellent to me to be asked to inquire into the private devotions of the Rector.]

The second altar is in fact an altar whatever the Rector may say. It was placed there after a faculty had been refused, and, at the very lowest, is seriously liable to misinterpretation. The respondent is not prepared to accept the Rector's undertaking, and presses for its removal. The illegality of the tabernacle is not denied. It would be a dangerous and improper course to suspend the order for its removal on such an undertaking as the Rector offers.

Veneration of the crucifix above the tabernacle has been proved, and it ought not to remain.

[THE DEAN OF THE ARCHES. I am very reluctant to order the removal of anything which has long been in the church in close proximity to the Holy Table. What do you say as to the Rector's proposed undertaking in reference to the crucifix?]

The respondent contends that in view of the Chancellor's finding that he did not accept the Rector's evidence the Court ought not to act upon any undertaking offered by him.

The same argument applies as to the proposed undertaking in reference to the Stations of the Cross, and these, moreover, are illegal in any event.

Veneration of the image of the Blessed Virgin is established, nor is it without significance that it is placed in close proximity to the second altar.

The illegality of the remaining articles is not seriously disputed, and, upon the whole case, it is submitted that the

Chancellor has exercised a discretion which is not shown to be erroneous, and his decision should be upheld.

Sir Henry Slesser K.C. in reply.

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Cur. adv. vult.

June 21. THE DEAN OF THE ARCHES read the following judgment: This is an appeal from the Consistory Court of St. Edmundsbury and Ipswich. The case began with a petition by Mr. Packard, a parishioner and Parochial Church Councillor and now a churchwarden of Capel St. Mary, asking for a faculty to remove a number of articles from the parish church. Citation was issued. The Rector and then Churchwardens appeared to oppose the petition and to ask for a confirmatory faculty in respect of these articles which had been introduced into the church without a faculty. The learned Chancellor, Mr. North, after hearing the case, receiving a considerable body of evidence and hearing counsel, decided to grant a confirmatory faculty as to some of the articles, but as to the remainder, I think eighteen in number, to grant a faculty for their removal as prayed by the petition. The Rector and then Churchwardens appealed against the latter part of this decision.

The petitioner's objection to the articles the subject of this appeal (I am not concerned with the others, as to which the learned Chancellor's decision to allow their retention is unchallenged by either side) is that they are either illegal ornaments or decorations which have been used or are likely to be used for superstitious purposes, and therefore ought not to be allowed to remain in the church. Having regard to the nature of this objection the opinion of the parishioners is not perhaps of very great weight so far as this litigation is concerned, but such indications as there are may be mentioned. The Parochial Church Council has twice passed, by eight votes to six, a resolution in favour of the retention of all these articles, the Rector and his wife giving votes in the majority. A memorial purporting to be signed by 220 parishioners above 18 years of age, out of a total population of 556 containing 330 adults, was produced at the hearing, but no attempt seems to have been made to prove the genuineness of the signatures, and, although I find no express ruling by the Chancellor, it was apparently disregarded, as it ought to have been, by him. I think a memorial of this sort, when there is no opportunity of the Court's knowing the representations made to the signatories before their signatures were obtained and no opportunity of cross-examining them at the hearing, is not admissible.

I propose to deal with the various articles, so far as I can do so, in groups. I begin with images. They are four in number: (1.) a crucifix over the altar in the chancel; (2.) a small crucifix attached to the chancel wall at the north side and having relation to the arrangements made for hearing confession; (3.) a crucifix over the side altar or, as the Rector prefers to call it, cupboard; (4.) an image of the Blessed Virgin Mary.

I recently explained, in this Court, the law of the Church of England as to images as I understand it, and I propose to deal with these images in accordance with the law thus stated: *Vincent* v. *Rector of St. Magnus-the-Martyr*. (1)

As to (1.) the learned Chancellor says: "The evidence has satisfied me that this crucifix is abused." I am not disposed to attach much weight to mere gestures of reverence, such as bowing or crossing oneself. But in this case it was deposed that the Rector at Holy Communion ceremonially censed the crucifix and genuflected before it. This was not denied by the Rector. On this evidence I do not see that the learned Chancellor could come to any other decision than that I have stated. But Sir Henry Slesser for the Rector, on his behalf and in his presence, has offered an undertaking that if the crucifix remains he will not use any ceremony for its veneration, and in particular he will neither genuflect to it or cense it, nor permit other officiant clergymen to genuflect to it or to cense it. I think if this undertaking is made part of the confirmatory faculty this crucifix may be included in it.

(1) [1925] P. 1.

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As to (2.) I proceed to deal with it in conjunction with the "confessional stool" and the notices displayed in the church of times when confessions can be heard, and certain manuals or books of devotion placed in the church. The learned Chancellor decided that the faculty for removal should include what is described as a "confessional stool," on the ground that taken in conjunction with a crucifix hanging on the wall near the stool, a notice board announcing when confessions could be heard, and certain manuals exposed in the church for study or sale, it constituted "an apparatus for confession which was illegal in the Church of England." I do not propose to discuss the subject of auricular confession generally. The learned Chancellor's judgment illustrates how difficult it would be to do so briefly, and at the same time accurately. He has, if I may be allowed to say so, not quite clearly appreciated the distinction between "compulsory confession" and what he calls "habitual confession" inculcated, perhaps with urgency, by the incumbent. This is a distinction which would seriously affect the result if the incumbent's personal responsibility were in question. But for the present application it is enough to note that the Church of England expressly allows persons, under certain circumstances, to make confession to a minister and directs ministers to hear such confessions. I refer to the exhortation in the Communion Service, the 113th canon of 1603 and the passage in the second part of the Homily on Repentance, of which the learned Chancellor quotes a part only, as condemning "compulsory" confession. While the occasions when such confessions are contemplated are deemed to be special, no limit is placed to their frequency, and it is not unreasonable, probably advisable, that when such confessions are desired they should be heard in the open church rather than in a vestry or a confessional box. Indeed confessional boxes have been sometimes removed from churches by faculty as not being part of the regular church furniture and fittings recognized by the Church of England: *Bradford* v. *Fry* (1); *Davey* v. *Hinde.* (2)

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(1) 4 P. D. 93.

(2) [1901] P. 95; [1903] P. 221.

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The stool objected to in this case is nothing more than an ordinary kneeling stool, which, if not appropriated to this purpose, might and probably would be used as part of the seating accommodation of the church. I see no reason why it should be included in the faculty for removal, and on the other hand there seems no ground for distinguishing it from other articles in the church and attaching it by faculty to a particular spot in the church. I therefore decide that it is not to be included either in the faculty for removal or in the confirmatory faculty for retention.

As for the crucifix hanging near this stool, it is obviously intended and used in order to assist the devotions of those who are making confessions, but there is no evidence either that it is used, or is likely to be venerated or adored, contrary to the law of the Church of England. I think, therefore, it may properly be included in the confirmatory faculty. The notices giving information as to times and opportunities for confession do not indicate that confession is to be deemed compulsory—e.g., that Communion will be refused to those who have not made a confession. If they did I think it would be necessary to grant the faculty for their removal. But as they can only, at the most, be regarded as invitations to the parishioners to come to confession, I am unable to say that they are so outside the limits of the discretion of the person having the cure of souls in the parish that they ought to be compulsorily removed. They will, therefore, not be included in the faculty for removal nor in the confirmatory faculty.

With regard to the manuals of devotion placed by the Rector in the church, I gather that the Rector, if I may be allowed to say so, very properly, has submitted them to the Bishop for his consideration and intends to obey his directions with regard to them, and they have been removed from the church. The learned Chancellor seems to have devoted great attention to these manuals, and a large portion of the evidence consists of cross-examination of the Rector as to his opinions in relation to matters dealt with in these manuals, many of which he confessed he had not read. In my view it is possible to attach exaggerated importance to these manuals. They cannot but produce suspicion as to the Rector's tendencies, but his teaching is a matter for the Bishop's consideration and action, if any seems to the Bishop necessary. The Rector's views as to confession, however erroneous they may be, cannot free him from his duty to hear confessions under the circumstances stated in the Prayer Book, and cannot render illegal reasonable arrangements for hearing such confessions. These manuals do not appear to me proper subjects for a faculty. Their removal by faculty would be nugatory, because they could easily be replaced by others of the same sort. I shall therefore allow the appeal so far as it seeks the reversal of the learned Chancellor's decision as to their removal, but I shall not accede to the appellants' application for their inclusion in the confirmatory faculty.

As to (3.) I proceed to deal with it in conjunction with the second Holy Table itself and the candlesticks which, together with a crucifix, are placed on or over it. It appears that in 1924 the Rector applied for a faculty for a second Holy Table, which he proposed should be a stone one. The learned Chancellor refused to sanction a stone Holy Table, and made certain proposals which were not accepted by the Rector, and in the end the learned Chancellor decided that in this church no second Holy Table was necessary. Subsequently the Rector brought a disused Holy Table from the vestry—it had been formerly the Holy Table in the chancel—and without further communication with the Chancellor placed it where it now stands, draped as an altar and with a crucifix and candlesticks thereon. But the Rector says he has never celebrated at this second Holy Table, regards it as a mere decoration, describes it as a cupboard—it contains a drawer or drawers—and " a place to which children could come and say their prayers and feel at home." The learned Chancellor having decided that no second Holy Table was necessary in this church, and having himself inspected it as it was and as it is, animadverts strongly on the Rector's action, and decides for the removal of the Holy Table, images and candlesticks. The question of a Holy Table in a particular church is essentially one of discretion, and having regard to what has occurred and to the Chancellor's intimate knowledge of the place, I do not think it would be right to interfere with his exercise of discretion. As to these articles, therefore, the appeal must be dismissed.

I think the same course for very much the same reasons must be followed with regard to (4.), the image of the Blessed Virgin Mary with its accompanying candlesticks and flower vases. The image was recently introduced without faculty, and is placed in a conspicuous position standing by itself on the pedestal of the lectern, which without faculty has been removed to make way for it. The candles are lit, and I suppose flowers are placed in the vases, on Church festivals. On the other hand the Rector disowns paying it "superstitious" reverence. Certainly the arrangements seem suitable for veneration of the image, and the learned Chancellor deems that there is danger of its veneration, and therefore proposes to include it and its accessories in the faculty for removal. He has seen the church, the image and its surroundings, and I cannot say he is wrong. I think also he is right in granting the faculty for the restoration of the lectern to its original position.

I proceed next to the question of lights. The law is clear that the ceremonial use of lights is forbidden, but that the presence of two lights on the Holy Table during the Communion service, lighted before the beginning of the service, is not forbidden: *Read* v. *Bishop of Lincoln.* (1)

Of course the use of lights for mere purposes of illumination, as, e.g., in the evening after dark, is not forbidden.

In this church there are six candles on the retable behind the altar, which are lighted before the Communion Service (celebrated in broad daylight) begins and are extinguished after it is finished. There are also two candlesticks with candles, which are lighted and carried about during the Communion Service, being held by boys on each side of the gospeller. They are also carried in processions and are

(1) [1891] P. 9; [1892] A. C. 644.

used for the services of the Stations of the Cross. There are also two candelabra attached to the wall, one on each side of the altar. These are ordinarily covered by curtains. But the Rector admits that when there is a service of Adoration of the reserved Sacrament the curtains are drawn aside and the candles in the candelabra and on the retable are lighted. There is also a hanging lamp in front of the altar which, as I understand the Rector's evidence, is kept alight when the Sacrament is reserved with a special view to its adoration.

I think the learned Chancellor is right in including these various lights, of which the ceremonial use is clear, in the faculty for removal, except that as to the six candlesticks on or behind the altar the removal must be limited to four, so that it may remain possible to have two lights on the Holy Table at Holy Communion, "for the signification that Christ is the very true Light of the World," and as permitted by law.

I can deal with the other matters shortly :—

First, the tabernacle over the altar which is used for the reservation of the Sacrament. That is an illegal ornament used in connection with an illegal ceremony: *Bishop of Oxford* v. *Henly* (1) ; *Davey* v. *Hinde.* (2)

Secondly, the sacring bell or gong, which is sounded at Holy Communion during the consecration. This is an illegal ornament, not being included in the ornaments of the Church mentioned in the First Prayer Book of Edward VI., and its use has been more than once prohibited as unlawful: *Elphinstone* v. *Purchas* (3) ; *Hebbert* v. *Purchas* (4) ; *Vicar and Churchwardens of St. John the Evangelist, Clevedon* v. *All having Interest.* (5)

Thirdly, the censer, which is used during the Communion Service for what the Rector admits is the ceremonial use of incense. The ceremonial use of incense is illegal: *Martin* v. *Mackonochie* (6) ; *Bishop Sumner* v. *Wix.* (7)

(1) [1907] P. 88 ; [1909] P. 319.

(2) [1903] P. 221.

(3) (1870) L. R. 3 A. & E. 66, 98.

(4) (1872) L. R. 4 P. C. 301, 307.

(5) [1909] P. 6.

(6) (1868) L. R. 2 A. & E. 116, 215.

(7) (1870) L. R. 3 A. & E. 58.

Fourthly, the Stations of the Cross, consisting of the whole series, including the St. Veronica picture. The Rector admits that the services and instructions known as the Stations of the Cross are held and that lights are used ceremonially in connection with them. These pictures are illegal ornaments: *Clifton* v. *Ridsdale* (1); *Markham* v. *Vicar, etc., of Shirebrook* (2); *In re Christ Church, Ealing.* (3)

Fifthly, the "Holy Water" stoup. The Rector admits that he teaches the children of the parish to use "Holy Water" from the stoup, by making the sign of the Cross with it on entering and leaving the church. This, again, is an illegal ornament, and its use has been more than once condemned: *Hebbert* v. *Purchas* (4); *Davey* v. *Hinde.* (5)

Sixthly, the notices exhibited in the church asking for prayer for the repose of the soul of named persons who have died. The learned Chancellor has come to the conclusion from a study of the manuals to which reference has been made already that the Rector "teaches purgatory." The Rector disowns the charge, but however that may be, these notices do not contain the smallest allusion to purgatory, and it seems to me impossible to read into them anything about it. As the learned Chancellor truly says: "The Church of England nowhere forbids us to pray for the dead," although hitherto such prayers have not been included in our public services: *Breeks* v. *Woolfrey.* (6) Even this will not be the case in future if the revised Prayer Book should receive the sanction of law. On the other hand if the Rector's views on this subject are erroneous and improperly colour his teaching, that is a matter for the disciplinary action of the Bishop and has nothing to do with the present proceedings. I think the learned Chancellor's decision must be reversed on this point. These notices do not seem to me an appropriate subject for faculty, and I think that they should be merely excluded from the faculty for removal, without being included in the confirmatory faculty.

(1) (1876) 1 P. D. 316, 359; (1877) 2 P. D. 276.

(2) [1906] P. 239.

(3) [1906] P. 289.

(4) (1871) L. R. 3 P. C. 605, 651.

(5) [1901] P. 95; [1903] P. 221.

(6) (1838) 1 Curt. 880.

I do not think it would be right to interfere with the Rector's private devotions, and I am therefore not prepared to affirm the decision of the learned Chancellor as to the two books which the Rector keeps on the altar. If action is to be taken with reference to these books or their use, as is conceivable, that seems to me to be a disciplinary matter with which the Bishop must deal.

The result of this appeal is this. I affirm the decision of the learned Chancellor as to the removal of: (*a*) tabernacle, (*b*) sacring bell or gong, (*c*) four out of the six candlesticks on retable, (*d*) censer, (*e*) Stations of the Cross, (*f*) two candlesticks on credence, (*g*) second Holy Table with candlesticks and crucifix, (*h*) image of Blessed Virgin Mary with candlesticks and vases, (*i*) "Holy Water" stoup, (*j*) two brass candelabra, (*k*) hanging lamp in chancel, and (*l*) for the restoration of the lectern to its former place.

I reverse the learned Chancellor's decision and make no further order as to: (*m*) books displayed on two tables in church, (*n*) notices as to times for confessions, (*o*) confessional stool, (*p*) Rector's books of devotion on the Holy Table, (*q*) notices asking for prayers for deceased persons.

I reverse the learned Chancellor's decision: (*r*) as to the crucifix on or over the Holy Table, (*s*) as to the crucifix hanging on the chancel wall, and direct that they be included in the confirmatory faculty, which the learned Chancellor proposes to grant the Rector and Churchwardens, but so that the faculty is granted in respect of these crucifixes until further order only and, as to the crucifix on or over the Holy Table, subject to the Rector's undertaking already mentioned.

The decision of the learned Chancellor has been affirmed to a very considerable extent, but on the other hand much of the evidence below was devoted to the manuals displayed in the church and questions connected with them, as to which the learned Chancellor's decision has not been upheld. I think, therefore, the proper order is to direct the appellants to pay one-half of the taxed costs of the respondent of this appeal. The learned Chancellor directed the present

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appellants to pay the petitioner's costs below, and I do not vary that order.

In remitting this case to the Consistory Court, I desire to say that care must be taken in drawing up the faculty for removal to give time and facilities to the Rector and Churchwardens to act on it before the petitioner is allowed to intervene, and also for the proper care and custody of the articles when they have been removed from the church. A useful form will be found in the report of *Davey* v. *Hinde*. (1)

Solicitors for appellants: *Brooks, Jenkins & Co.*

Solicitors for respondent: *Sharp & Benest, for Steward, Rouse, Vulliamy & Son, Ipswich.*

A. L.

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June 27;
July 11, 27.

DIVORCE.

ALLISON *v.* ALLISON.

Divorce—Restitution of conjugal Rights—Periodical Payments—Security—Reversionary Interest of Respondent Husband—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 17—*Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68), *s.* 2—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 4; *ss.* 187, 196.

Under the Judicature (Consolidation) Act, 1925, s. 187, sub-s. 2, a reversionary interest of a husband is not an asset which can form part of the security to be ordered for his periodical payments to his wife on his non-compliance with a decree of restitution of conjugal rights.

Tangye v. *Tangye* [1914] P. 201 explained and followed.

THE wife, Hilda Allison, filed a petition for periodical payments under the Judicature (Consolidation) Act, 1925, s. 187, in consequence of the non-compliance of the husband, Gordon Allison, with a decree for restitution of conjugal rights, pronounced at her instance on January 24, 1927. The petition for periodical payments alleged that the husband had a reversionary interest under the will of his father, subject to the life interest of his mother, in the sum of approximately 20,000*l.* and the proceeds of sale of a house.

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(1) [1901] P. 95, 126; [1903] P. 221, 237, 238.

The existence of this reversionary interest was admitted, and by the order of a registrar made on the petition the husband was directed to secure to the wife one-third of the income arising from the income of the reversionary interest, when fallen in, during the joint lives of the husband and wife. The order contained other provisions not material to this report. The husband appealed from the part of the order dealing with the reversionary interest, the point arising being as to the construction to be placed upon the judgment of Sir Samuel Evans in *Tangye* v. *Tangye*. (1)

The appeal summons was adjourned into Court.

H. B. Durley Grazebrook for the husband.

Noel Middleton for the wife.

Cur. adv. vult.

July 27. HILL J. [in the course of his judgment:] The contention as to the reversionary interest raises a difficult question, whether in proceedings in respect of disobedience to a decree of restitution of conjugal rights there is power to order an immediate dealing with a reversionary interest of the husband by making him secure in the present to the wife a part of such reversionary interest. It may well be that the general powers conferred by the Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1, include such a power in cases of divorce and nullity of marriage. But that section has no reference to restitution of conjugal rights. That is dealt with in s. 190, sub-s. 4, and s. 187, which must be read with s. 196. Sect. 190, sub-s. 4, merely provides that "where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife the Court may make such order for alimony as the Court thinks just." This re-enacts the corresponding provision in the Act of 1857, s. 17, and it was decided in *Hyde* v. *Hyde* (2) that the husband could not be ordered under the section to give security for payment of alimony. Sect. 187 is the relevant section. It empowers the Court to order periodical payments

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(1) [1914] P. 201.

(2) (1865) 4 Sw. & Tr. 80.

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and to order that the husband shall secure to the wife the periodical payments. Sect. 196 gives power to vary any order for periodical payments. It seems to me that an order to secure them can only be made in respect of periodical payments already or at the same time ordered. The periodical payment must be first fixed in amount and then ordered to be secured. That is inconsistent with the existence of a power to order the immediate securing of a prospective periodical payment of uncertain amount, that may hereafter be ordered. The point is, I think, covered by authority. In *Tangye* v. *Tangye* (1), a decision upon the Matrimonial Causes Act, 1884, s. 2, which is identical in terms with the Judicature (Consolidation) Act, 1895, s. 187, Sir Samuel Evans said (2): "The third head of submission in the registrar's report is that 'one-third of the husband's interest under his father's will to come into possession after the death of his mother be secured for the benefit of the petitioner for her life.' This does not comply with the provisions of the section, and is not a proper order for periodical payments. If and when the husband's reversionary interest under his father's will comes into possession and provides him with more capital or income, an application can be made for an increase of the amount under s. 4 of the Act. Such an application could also be made if the husband sold his reversionary interest (if he has the power to do so) before it fell into possession." It was suggested in argument that the only objection to the submission of the registrar's report in that case was that it directed security for the benefit of the petitioner for her life instead of during the joint lives. I do not so understand the judgment. I do not think that this is the only objection that Sir Samuel Evans was taking to the submission. I think that what Sir Samuel Evans said means this: that the order for security cannot be made until the reversionary interest comes into possession or is sold, and it can then be made in conjunction with an increase in the periodical payments. I think also that this accords in principle with the difference which the Court has always considered to exist between decrees putting an end to the marriage and decrees which do not put an end to the marriage. When a decree for restitution of conjugal rights is made, it must always be the assumption of the Court that the decree will some day or other be obeyed and the arrangements therefore that are made are properly tentative arrangements, alterable from time to time; whereas when a marriage is finally declared null or is dissolved, it is more natural that some permanent arrangement should be made.

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(1) [1914] P. 201, 211. (2) [1914] P. 211.

The result so far is that the order for periodical payments was properly made, but that the direction that the respondent now secure any proportion of his reversionary interest must be omitted.

Solicitors for the husband: *Stokes & Stokes.*

Solicitors for the wife: *Johnson, Weatherall, Sturt & Hardy.*

R. M. M.

[IN THE COURT OF APPEAL.]

C. A.
1927
June 27, 28;
July 15.

THE FAGERNES.

Shipping—Jurisdiction—Bristol Channel—Limits of British territorial Waters—Statement by Attorney-General—Collision—Foreign-owned vessel—Action in personam—Service of Notice of Writ out of the Jurisdiction—R. S. C., Order XI., *r.* 1 (*ee*).

The defendants, an Italian company, moved to set aside an order under Order XI., r. 1 (*ee*), for service of notice of a writ in personam upon them in Italy in respect of a collision between their vessel, which sank, and the plaintiffs' vessel in the Bristol Channel, some 10½ or 12½ miles from the English coast and 9½ or 7½ miles from the Welsh coast, according to the respective cases. Hill J. held that the waters where the collision occurred were within the fauces terrae and accordingly within the bodies of the counties of Devonshire and Glamorganshire, and, therefore, within the jurisdiction of the High Court.

On appeal, the Court was informed by the Attorney-General that he was instructed by the Secretary of State for Home Affairs that the spot where the collision was alleged to have occurred was not within the limits to which the territorial sovereignty of His Majesty extended:—

Held, per Atkin and Lawrence L.JJ., that the statement of the Attorney-General was binding on the Court; per Bankes L.J. that the Court was not necessarily bound to accept the information as conclusive, but that, having regard to the absence of authority and to the general trend of modern jurists to limit the width of the fauces terrae within which there was territorial sovereignty, the Court should be guided by the information so given; and therefore (per Curiam) that the place where the collision took place was not within the jurisdiction of the Court and that the order for service of notice of the writ on the defendants in Italy must be set aside.

Decision of Hill J. [1926] P. 185 reversed.

APPEAL by the defendants, the Società Nazionale di Navigazione, owners of the Italian steamship *Fagernes*, to set aside an order for service of notice of the writ in the action out of the jurisdiction.

On March 17, 1926, a collision occurred in the Bristol Channel between the steamship *Cornish Coast*, owned by the plaintiffs, and the *Fagernes*. The *Cornish Coast* was damaged and the *Fagernes* was sunk. In these circumstances the plaintiffs brought their action for damage by collision in personam against the owners of the Italian steamship, and obtained an order in chambers giving leave under Order XI., r. 1 (*ee*), to serve notice of the writ out of the jurisdiction. The defendants thereupon moved to set aside this order on the grounds that the collision occurred outside British territorial waters, and that the Court had no jurisdiction to try the case. The place of collision was 10½ or 12½ miles distant from the English coast and 9½ or 7½ miles from the Welsh coast, according to the respective cases, the distance across the channel being about twenty sea miles.

Hill J. held that the waters of the Bristol Channel, at any rate above a line drawn from Bull Point, in Devonshire, to Port Eynon Head, in Glamorganshire, were inter fauces terrae, and were thus part of the territory of the State which owned the land on both sides, and therefore within the jurisdiction of the High Court. He accordingly held that the order for service of the notice of the writ out of the jurisdiction was rightly made.

The defendants appealed.

The appeal came before the Court on December 9, 1926, when their Lordships thought it raised questions on which the Crown might desire to be represented, and accordingly the case was adjourned for the attendance of the Attorney-General if so advised.

1927. June 27. *E. A. Digby K.C.* for the appellants. The case will be fully argued by the Attorney-General, but the appellants' contention, put shortly, is that jurisdiction at common law ceases at low water mark except in waters within the fauces terrae. "That arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner" (per Lord Hale in De Jure Maris et Brachiorum ejusdem (1)). The waters of the Bristol Channel at the place where this collision occurred are some twenty miles wide and cannot be said to come within Lord Hale's definition. The decision in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (the *Conception Bay Case*) (2), which is the strongest case against the appellants' contention, was based on statutory recognition of the bay as within the territory of Newfoundland, and in *Cunningham's Case* (3), relied on by Hill J., the width of the Channel at the place in question was less than ten miles, and it was not necessary to determine what was the entrance to the Bristol Channel.

Sir Douglas Hogg A.-G. and *Giveen* for the Crown. There is no recognized rule of international law on the question, and it is not desirable that the Court should lay down any principles unless bound so to do. The high seas, however, should be as wide as possible. It is clear that at least so much as is within a six mile line drawn from shore to shore is inter fauces terrae, and such waters are national as distinct from territorial. It is conceded also that whenever a country has possessed itself of a bay or gulf over which it has effectively asserted dominion, such waters, although considerably wider, may become the territory of that country. But the modern tendency is to narrow the limit of national waters. In

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(1) Hargrave's Law Tracts, 1787, I., cap. iv., p. 10.

(2) (1877) 2 App. Cas. 394.

(3) (1859) Bell's C. C. 72.

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former times the whole of St. George's Channel was considered to be within the King's dominions, and in large areas, styled "the King's Chambers," fixed by drawing a straight line from one point to another "about the Realm of England," the Crown claimed dominion and prohibited all hostile acts of belligerents. For an account of "the King's Chambers" see Fulton's Sovereignty of the Sea, p. 118; Coke, Rep., Pt. XII., pp. 80–81; see also Selden's Mare Clausum, ch. xxx.; Grotius' De Jure Belli ac Pacis, Book II., ch. 3; Marsden's Law and Custom of the Sea, vol. ii., p. 231; and De Martens' Précis du Droit des Gens, Book II., ch. 1, section 42. No one would now suggest the wide limits laid down by those jurists. At a later period, Vattel, the great authority of the middle of the eighteenth century, wrote that "a bay, entrance into which can be prevented, may be possessed and made subject to the laws of the sovereign" (Droit des Gens (1863), Book I., ch. xxiii., section 291). In more modern times some jurists have adopted as a test the power of the State effectively to defend the entrance and have confined territorial bays to those whose entrances can be commanded by artillery or are not wider than twice the actual range of cannon; see Calvo, Droit International, 5th ed., 1896, vol. i., section 367; Fiore, Droit International Codifié (1911), section 270; and Despagnet, Cours de Droit International Public (1905), section 406. Manning, in his Commentary on the Law of Nations, accepts a ten-mile limit; Halleck, 4th ed., vol. i., p. 175, lays down no definite rule as to the width of the entrance, but treats bays as territorial when enclosed by headlands belonging to the same State, as also does Wheaton (5th ed., p. 282). The late Professor Westlake, who draws a distinction between bays and gulfs, would confine territorial bays in general to those with entrances not more than six nautical miles wide (International Law (1910), vol. i., p. 191). Hall (8th ed., p. 196) leaves the question open, but both he and Pitt Cobbett (Leading Cases on International Law, 4th ed., vol. i., pp. 143–148) incline to the view that the real test of the territorial character of an inlet of the sea, whatever it may be called, is whether, having regard to its natural configuration, the width of its mouth, and the depth of penetration into the land, it can and ought to be effectively possessed and occupied by the littoral State. Many publicists also lay stress on the fact that, whatever rule may be adopted, there is a class of bay over which the littoral State is entitled to exercise exclusive jurisdiction, regardless of size, on the ground of settled usage: e.g., Pitt Cobbett; and Hershey, Essentials of International Law (1912), p. 200. See also Wharton, International Law Digest, vol. i., ch. 2, section 32; and an article by Sir Cecil Hurst on the "Territoriality of Bays" in the British Year Book of International Law, 1922–23, p. 54, in which he adopts a ten-mile limit.

Case law and international conventions are equally inconclusive. *Bruce's Case* (1), decided in 1812, related to Milford Haven with a narrow opening about which no doubt could be entertained. In *Cunningham's Case* (2), relied on by Hill J., it is true that Cockburn C.J. said that "the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded." But the actual decision was as to whether a crime committed on board a foreign ship in Penarth Roads was committed within the county of Glamorgan. The width from shore to shore was actually less than ten miles; and the fact that the judgment goes into the question of the islands in the Bristol Channel, and in particular Flatholme, negatives the headland to headland test adopted by the older jurists. In *Reg.* v. *Keyn* (3) the effect of the decision was that except where Parliament has thought fit to extend it the territory of England stops at low water mark: see the observations of Lord Coleridge C.J. in the succeeding case of *Harris* v. *Owners of Franconia.* (4) The Territorial Waters Jurisdiction Act, 1878, however, stated in its preamble that the rightful jurisdiction of Her Majesty "extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's Dominions

(1) (1812) Leach's C. C. 1093.
(2) Bell's C. C. 72.
(3) (1876) 2 Ex. D. 63.
(4) (1877) 2 C. P. D. 173, 177.

to such a distance as is necessary for the defence and security of such dominions." In *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1) the Judicial Committee advised that Conception Bay, which is rather more than twenty miles wide between the headlands, was part of the territorial waters of Newfoundland, but in this case the Legislature had by Acts of Parliament declared the bay to be British territory, and there was evidence that the Government had exercised undisputed dominion over it for a long time. Similarly, in *Mortensen* v. *Peters* (2) the Court merely had to give effect to a by-law made by the Fishery Board under the Herring Fishery (Scotland) Act, 1889, concerning (inter alia) Moray Firth. In a debate in the House of Lords on February 21, 1907, regarding this case the Under-Secretary of State for Foreign Affairs stated that according to the views hitherto accepted by the Government territorial waters included " the waters of bays the entrance to which is not more than six miles in width . . . . by custom, however, and by treaty and in special conventions the six-mile limit has frequently been extended to more than six miles " (169 Hansard, 989). In *Manchester* v. *Massachusetts* (3), also, the Supreme Court of the United States held that Buzzards Bay, the entrance to which does not exceed six sea miles, was for jurisdictional purposes part of Massachusetts. In this case the Court cited *Commonwealth* v. *Peters* (4), where the test applied was that the place was within a bay " not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the other side."

As regards the view taken in treaties, in 1910, in the *North Atlantic Coast Fisheries Arbitration* (5) the Hague Tribunal was called upon to interpret a clause in a treaty of 1818 between Great Britain and the United States whereby the inhabitants of the latter country gave up certain fishing privileges formerly exercised " within three marine miles of any of the coasts, bays, creeks or harbours " of

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(1) 2 App. Cas. 394.

(2) (1906) 8 F. (J.) 93; 14 Sc. L. T. 227.

(3) (1890) 139 U. S. 240, 256.

(4) (1847) 12 Met. 387.

(5) Hague Court Reports, p. 141.

H.M. Dominions in America; and the majority of the arbitrators decided that the distance should be measured "from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay." See also the Sea Fisheries Act, 1843 (6 & 7 Vict. c. 79), giving effect to an agreement with France in relation (inter alia) to bays ten miles wide, and the opinion of the Central American Court of Justice in *Salvador* v. *Nicaragua*. (1)

It is apparent, therefore, that there is no recognized rule. It is submitted, however, that at any rate where the width of the waters is over twelve miles, unless there is evidence that the littoral country has established definite dominion over them there is no effective sovereignty. In the present case there is no evidence of appropriation, and if the Court wishes information as to whether the Crown claims this part of the Bristol Channel as being within the territorial jurisdiction of His Majesty it can be given.

Balloch for the respondents. Assuming that the Attorney-General's statement may be that the Crown does not claim jurisdiction over the area in which this collision took place, such a statement cannot be more than an expression of opinion as to whether that part of the Bristol Channel is within the realm. It is not conclusive, and cannot affect the respondents' position in March, 1926, when the *Fagernes* sank. Where the limits of the realm are not declared by Parliament "the question is necessarily left to the judges": per Brett J.A. in *Reg.* v. *Keyn*. (2) If such a statement were conclusive it could have been made in that case and all the elaborate arguments would have been unnecessary.

The decision of Hill J. was right. The question was really decided in *Cunningham's Case* (3) and approved in the *Conception Bay Case*. (4) The crime in *Cunningham's Case* (5) was committed below low water mark, and therefore outside the limits of the county unless within the fauces terrae. The Court did not limit the fauces terrae to the waters above

(1) (1917) 11 Am. Journal of Int. Law, p. 674.

(2) 2 Ex. D. 63, 126.

(3) Bell's C. C. 72.

(4) 2 App. Cas. 394.

(5) Bell's C. C. 72, 86.

Lavernock Point, but said that "the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded." Sovereignty is, and always has been, exercised over the waters of the Bristol Channel, for the whole of it east of Lundy is a pilotage district and still in parts a compulsory pilotage district: see Barry Pilotage Order, 1921 (11 & 12 Geo. 5, c. cxii.), and the Bristol Channel Pilotage Act, 1861, reciting 47 Geo. 3, c. xxxiii. In most cases it is only within territorial waters that pilotage is compulsory: see also the Merchant Shipping Act, 1894, ss. 685-688 and s. 8 of the Maritime Conventions Act, 1911. The Herring Fishery (Scotland) Act, 1889, which empowered the Fishery Board to prohibit certain methods of fishing within an area which included the Moray, Cromarty and Dornoch Firths shows that the Legislature treated these waters as part of the King's territories: *Mortensen* v. *Peters* (1); and see also *Lord Advocate* v. *Clyde Navigation Trustees* (2), in which the ground of the decision was that the solum of Loch Long was in the Crown, and *Anna Kumaru Pillai* v. *Muthupayal* (3), where Palks Bay, between India and Ceylon, seventy miles long and fifty-six to sixty miles wide, was regarded as an integral part of H.M. Dominions. In *Keyn's Case* (4) there was no unanimity in the opinions of the majority of the judges, and the view of the minority was supported by the Legislature in the next session but one when the Territorial Waters Jurisdiction Act, 1878, was passed; for the preamble in effect shows that the decision in *Keyn's Case* (4) that the sovereignty of the Crown stops at low water mark was wrong. At any rate, apart from statute, the bed of the sea, at least within the three-mile limit, is the property of the Crown: see *Secretary of State for India* v. *Chelikani Rama Rao.* (5) *Harris* v. *Owners of Franconia* (6) merely followed *Reg.* v. *Keyn* (4), and is not binding on the present Court.

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(1) 8 F. (J.) 93; 14 Sc. L. T. 227.

(2) (1891) 19 R. 174.

(3) (1903) I. L. R. 27 Mad. 551.

(4) 2 Ex. D. 63.

(5) (1916) I. L. R. 39 Mad. 617; L. R. 43 Ind. Ap. 192.

(6) 2 C. P. D. 173.

[LAWRENCE L.J. referred to *Carr* v. *Fracis Times & Co.* (1), and, on the power to grant fishing rights, *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2), and *Attorney-General for Canada* v. *Attorney-General for Quebec.* (3)]

There is no ground for laying down a ten or a twelve mile limit, which in themselves are destructive of the six-mile limit. In *The North Atlantic Coast Fisheries Arbitration* (4) no effect was given to the ten-mile limit view. Pitt Cobbett, 4th ed., vol. i., p. 148, inclines to the view that the real test of the territorial character of an inlet of the sea is its natural configuration. Tested in this way, a channel which was part of one of "the King's Chambers" (see Wheaton, 5th ed., p. 285), and penetrates far into the land, should be regarded as wholly territorial. Norway claims as territorial the waters of the Varanger Fiord, thirty-two miles wide: see Oppenheim, 3rd ed., vol. i., p. 343. In *The Lökken* (5) Norway claimed as territorial waters a distance of three miles beyond a bay over eleven miles, and, without admitting the claim, for the purposes of the case Great Britain accepted it: see also Fulton's Sovereignty of the Sea, p. 650.

Digby K.C. in reply referred to *The Annapolis* (6), cited in *Keyn's Case.* (7)

At the close of the arguments, THE COURT, by a majority, thought that the Attorney-General should be asked whether he was in a position to state whether the Crown did or did not claim the place in the Bristol Channel where the collision occurred as being within the realm of England, and

The Attorney-General replied that the Secretary of State for Home Affairs instructed him to say that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends."

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(1) [1902] A. C. 176.
(2) [1914] A. C. 153.
(3) [1921] 1 A. C. 413.
(4) Hague Court Reports, 141.
(5) (1918) 9 Ll. R. P. C. 18n.
(6) (1861) Lush. 295.
(7) 2 Ex. D. 63, 219.

[On the question of the conclusiveness of the Attorney-General's statement, *Duff Development Co.* v. *Kelantan Government* (1) and *Musmann* v. *Engelke* (2) were referred to.]

Cur. adv. vult.

1927. July 15. The following judgments were read :—

BANKES L.J. On March 17, 1926, two vessels came into collision in the Bristol Channel. One vessel was British owned ; the other Italian owned. As a result of the collision the Italian vessel sank. The British owners sought to make the Italian owners responsible for the collision. As no action in rem was possible owing to the loss of the Italian vessel, the British owners commenced an action in personam, and applied for leave to issue the writ out of the jurisdiction, upon the ground that the action was founded on a tort committed within the jurisdiction, and, therefore, within Order XI., r. 1 (*ee*).

An order having been obtained in chambers, the defendants moved to set it aside upon the ground that the place where the collision occurred was not within the jurisdiction. The point thus taken necessarily raised an extremely important and very interesting question, which was fully dealt with by Hill J. in a careful and exhaustive judgment. He finds that the collision occurred more than twenty miles to the east of Lundy Island, and some miles to the eastward of a line drawn from Bull Point in Devonshire to Port Eynon in Gower, which is part of Glamorganshire. The nearest point on the English coast is a little west of Ilfracombe ; the nearest point on the Welsh coast is Oxwich Head. The distance across is about twenty miles, the English coast being distant 10½ or 12½ miles and the Welsh coast 9½ or 7½ miles. In speaking of miles the judge is referring to sea miles.

The learned judge commences by defining the question which he has to decide as being whether the place where the collision occurred was "within the territorial jurisdiction of the King." He then refers to what is the undoubted fact, that within limits inlets of the sea into the land are part of the territory of the State which owns the land on both sides; and after referring also to the fact that the expression "inter fauces terrae" has high authority as an indication of what the limits are, he asks himself this pertinent question: "What are the inland waters contained within the land? What are the bays, gulfs or estuaries inter fauces terrae? What is the metaphor: the open mouth of a man or of a crocodile?"

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(1) [1924] A. C. 797, 813.

(2) [1927] W. N. 205.

This question has never been authoritatively answered, except in cases where some effective occupation has been proved, or some statutory recognition established, or where the opening is so narrow as to admit of no doubt. The answer to the question can be sought either in the domain of international law or, in the case of our own country, in our common law. The learned judge considers both. I do not propose to discuss the various and varying opinions of jurists and text writers, to which the learned judge, and to even a fuller extent this Court, has been referred, because it is common ground from the point of view of international law no agreement on the question has been reached. The learned judge so treats the matter.

His decision upholding the plaintiffs' contention is founded on his view of the common law, based on the language of the judgment in *Cunningham's Case.* (1) In that case the question was whether a collision which occurred between two vessels, and which resulted in the death of a member of the crew, had occurred in the county of Glamorgan, where the indictment for manslaughter was laid. In the present case the only evidence before the Court is that the collision occurred at the spot ascertained and described by Hill J. as above set out. In *Cunningham's Case* (1) a number of facts were proved. In the first place the collision occurred considerably higher up the Bristol Channel, where its width is not much over ten miles. The place of the collision was within the Port of Cardiff, and between an island which is part of the parish of Cardiff and the Welsh shore, and only three miles from that shore. It was with reference to these facts that Cockburn C.J. used the language upon which Hill J. founds his judgment. The passage in the judgment is as follows: "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan; and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms, between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shore of which its several parts are respectively bounded." (1)

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(1) Bell's C. C. 72.

If the case in this Court had been presented in the same form and on the same materials as it was presented to Hill J., I should have hesitated in accepting his conclusion, because it appears to me that the Court in *Cunningham's Case* (1) had not to consider the circumstances of the present case, where the width of the channel is so much greater, and there is an entire absence of anything indicating effective occupation, but were merely using language applicable to the facts of the case before them, without intending to lay down any rule applicable to other parts of the Bristol Channel. This view of the judgment in *Cunningham's Case* (2) is not, in my opinion, inconsistent with Lord Blackburn's comments on that judgment in *The Conception Bay Case.* (3) It is not, however, necessary to express a decided opinion upon this question, because, for a reason which I will proceed to

(1) Bell's C. C. 72, 86. (2) Bell's C. C. 72.
(3) 2 App. Cas. 394, 419.

indicate, the case as finally presented to this Court has assumed a different aspect.

When the appeal first came on some time ago, the Court felt that the question was one so materially affecting not only the rights and interests of the Crown but public interests also, that the Attorney-General should be given the opportunity of appearing, if he desired to do so. He did appear; and in the first instance he gave the Court an exhaustive statement of the opinions of jurists and text writers from very early times upon this much discussed question of the territorial jurisdiction over creeks, bays, etc.; and he referred the Court to all the relevant authorities, with the view of inducing the Court not to lay down any rule on the question, but to content themselves merely by saying that there was no authority for holding that the place of this collision was within the jurisdiction. The question of what is within the realm of England being one of the matters of which the Court takes judicial notice, we thought it right to ask the Attorney-General whether the Crown did or did not claim that particular part of the Bristol Channel where this collision occurred, as being within the territorial jurisdiction of the King; and he replied that the Crown did not. This information was given at the instance of the Court, and for the information of the Court. Given under such circumstances, and on such a subject, it does not in my opinion necessarily bind the Court in the sense that it is under an obligation to accept it.

Having regard, however, to the position created by the information given to the Court by the Attorney-General, to absence of authority and to the general trend of the more recent opinion on the question of limiting the width of the fauces terrae to which the rule of territorial jurisdiction should apply, I think the Court ought to be guided by the information given to the Court by the Attorney-General, to the extent of saying that they do not consider that there is sufficient authority for supporting the judgment of Hill J., and that the order appealed from must be set aside and the decision of the learned judge reversed with costs here and below. I confine my judgment to the particular part of the Channel where this collision occurred and to a case where no evidence of any effective occupation is given.

I desire also to say that the Court is indebted to the learned counsel who have argued this case for the assistance they rendered to the Court. The only reason why I do not deal with their arguments at length is because, having regard to the course the case took, it does not appear to me to be necessary to do so.

ATKIN L.J. The question to be decided in this case is no less momentous than whether the Bristol Channel is part of the realm of England. What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. In these circumstances the Court requested the assistance of the Attorney-General who, after elaborate and valuable argument on the municipal and international law, so far as it affects the question, eventually informed the Court that he had consulted the Home Secretary, and was by him instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extends. I consider that statement binds the Court, and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed.

I think, however, that it is desirable to make it clear that this is not a decision on a point of law, and that no responsibility rests upon this Court save that of treating the statement of the Crown by its proper officer as conclusive.

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Speaking for myself alone, if I had to decide this case upon the materials before Hill J. and the further authorities brought before us, I should have been inclined to come to the same conclusion as he did. It is quite certain that there is at present no such agreement in the practice of civilized States as to afford a definite rule to regulate territorial claims to the waters of gulfs and bays for the future; still less to determine what has been in fact the territorial jurisdiction in the past. It is also clear that whenever a rule can in the future be recognized as a principle of international law, it will have to admit exceptions where territorial jurisdiction has been effectively exercised beyond the limits of the general rule, whatever it may be; and in determining the existence of those exceptions, I do not know a better statement of the considerations that must be taken into account than is to be found in the Award of the Permanent Court of Arbitration at The Hague, in the *North Atlantic Coast Fisheries Arbitration*, in 1910: "The interpretation must take into account all the individual circumstances which, for any of the different bays are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general." (1)

One bears in mind that at this particular point the Channel is only about twenty miles wide, that it has on its north bank the teeming population of Glamorganshire with its coal ports, that it penetrates into the vitals of England, having towards the end of its course one of the oldest ports of the kingdom, Bristol. One has also to bear in mind that the whole of the Bristol Channel was part of one of the King's Chambers, which were delimited by an Order of James I. in 1604, which will be found set out in Selden's Mare Clausum, Book II., ch. 22.

The statement of the Crown in this case makes it unnecessary to trace the history of the claim to the King's Chambers, but I think it relevant that though some modern writers on international law have doubted whether the claim to them would be maintained in these days, yet they were treated as material to the decision of cases in prize by Sir Leoline Jenkins in the cases of *St. Anne*, *Biscay*, *Hope*, and *De la Mothe*, from 1665 to 1675. (1) The existence of the territorial jurisdiction over them was maintained in the leading English work on international law of last century, Phillimore, throughout its editions; was admitted by Wheaton, the leading American authority of that century; and also by Major-General Halleck, of the United States of America; and was supported by the English Attorney-General in the *North Atlantic Coast Fisheries Arbitration* in 1910. The alleged limit of ten miles in width which the Attorney-General contended was the boundary of that part of the Channel which was wholly territorial (apart from the three miles' coast limit) is not yet accepted and undoubtedly has admitted exceptions in the case of British, American, French and other national waters. Finally, though neither *Cunningham's Case* (2) nor *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (the *Conception Bay Case*) (3) determined this question as a matter of law, it seems to me plain that Cockburn C.J., in the former case, and Lord Blackburn in the latter, treated the Bristol Channel as territorial waters in that part of it which is between Glamorgan and Somerset—i.e., at a width exceeding ten miles. In my view, also, considerable importance should be attached to the fact that Lundy Island, twenty miles to the westward of the locus in quo, is part of Devonshire. I mention these considerations, without further discussion of the various questions and authorities concerned, to support the statement that I have already made that, in arriving at its conclusion the Court is not purporting to do more than give effect to the authoritative pronouncement of the Government. The appeal must be allowed, and the order for service of notice of the writ and the service be set aside with costs here and below.

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(1) Cd. 5396, Miscellaneous No. 3, 1910.

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(1) Wynne's Life of Sir Leoline Jenkins, vol. ii., pp. 727, 732, 755, 780.

(2) Bell's C. C. 72.

(3) 2 App. Cas. 394.

LAWRENCE L.J. I agree. The question of whether the alleged tort was committed within the jurisdiction of the High Court has given rise to an interesting discussion on the subject of the territorial character of inlets of the sea (such as bays, gulfs, estuaries and creeks, all of which for the sake of brevity I will call " bays ").

As the territorial jurisdiction of the High Court extends over the whole of England (including the principality of Wales and the town of Berwick-on-Tweed) it follows that, if the spot where the collision occurred is in the realm of England, the alleged tort was committed within the jurisdiction. The real question, therefore, is whether that part of the Bristol Channel where the collision occurred is in the realm of England.

It is common ground that there is no international treaty or convention expressly sanctioning or recognizing any territorial rights of the Crown over the Bristol Channel. Further, no evidence has been adduced that the Crown has possessed itself of, or has effectively asserted any territorial rights over, that part of the Bristol Channel where the collision occurred. In the absence of any express treaty or controlling executive act of the Government, the question arises whether there is any established general rule of international law for determining the territorial character of bays. The consideration of this question has occupied the greater part of the hearing both in the Court below and in this Court.

The Attorney-General, in the course of his able argument, has cited and commented upon the opinion of jurists, the practice of nations and the relevant judicial decisions. I do not propose to deal with these sources of information in detail, but content myself by saying that in my judgment the Attorney-General has established the proposition that, although the principle of claiming territorial rights over bays is well established as a rule of international law, and although there is no question as to the applicability of that principle in the case of bays, the entire land boundaries of which form part of the territory of the same State and the entrances of which do not exceed six sea miles in width, yet there is no recognized general rule of international law by which it can be determined whether any given bay, with an entrance wider than six sea miles, does or does not form part of the territory of the State whose shores form its land boundary. Each such case must depend upon its own special circumstances.

There is another matter which deserves mention here—namely, the suggestion that because the Bristol Channel is within the limits of the so-called King's Chambers, therefore it is necessarily within the King's territory. An interesting historical account of the King's Chambers is to be found in Fulton's Sovereignty of the Sea (see ch. iv., p. 118), which records the fact that in 1604 James I. issued a proclamation prohibiting all hostile actions of belligerents within certain limits along the English coast which were fixed by a jury of thirteen skilled men appointed by Trinity House. This proclamation had reference to the continuance of the war between the United Provinces and Spain (from which James had himself withdrawn), and according to Fulton (see p. 9) is not to be regarded as in any sense an assertion of maritime sovereignty or jurisdiction beyond what was then customary.

Oppenheim in his work on International Law (3rd ed., vol. i., p. 344) states that: "It must be specially observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers which include portions of the sea between lines drawn from headland to headland." In a note on the same page the author—after pointing out that whereas Hall (section 41, p. 159) says that England would no doubt not attempt any longer to assert a right of property over the King's Chambers, yet Phillimore (3rd ed., vol. i., section 200) still keeps up this claim—states that the attitude of the British Government in the Moray Firth case would seem to demonstrate that this claim is no longer upheld. The author is there referring

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to the fact that after the decision in *Mortensen* v. *Peters* (1) Parliament passed the Trawling in Prohibited Areas Prevention Act, 1909 (9 Edw. 7, c. 8).

In the present case the Attorney-General has put forward no claim on behalf of the Crown to the territorial character of the Bristol Channel by reason of its being within the King's Chambers, and his statement to the Court, to which I will refer later, expressly negatives such a claim. In these circumstances, the fact that the Bristol Channel is within the limits of the King's Chambers cannot in my opinion be relied upon as proving that it is within the territorial jurisdiction of the High Court.

The next matter for consideration is whether *Cunningham's Case* (2), upon which the learned judge in the Court below based his decision, covers the present case. For the reasons stated by Bankes L.J., with which I agree, I do not think that it does. That case was concerned with a different locality, and evidence was adduced there which satisfied the Court that the place where the offence was committed was within the parish and port of Cardiff, and therefore within the body of the county of Glamorgan. It was not necessary to decide and, in my opinion, the Court did not purport to decide that the Bristol Channel at the spot where the collision occurred in the present case was part of the territory of England. Therefore, even if the present case had been left where it was in the Court below, I should have felt great hesitation in agreeing with the conclusion reached by the learned judge. But the matter does not rest there. It is the duty of the Court to take judicial cognizance of the extent of the King's territory and, if the Court itself is unacquainted with the fact whether a particular place is or is not within the King's territory, the Court is entitled to inform itself of that fact by making such inquiry as it considers proper.

As it is highly expedient, if not essential, that in a matter of this kind the Courts of the King should act in unison with the Government of the King (see *Foster* v. *Globe Venture*

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(1) 8 F. (J.) 93; 14 Sc. L. T. 227. (2) Bell's C. C. 72.

Syndicate, Ld. (1)), this Court invited the Attorney-General to attend at the hearing of the appeal, and at the conclusion of the arguments asked him whether the Crown claimed that the spot where the collision occurred was within the territory of the King. The Attorney-General, in answer to this inquiry, stated that he had communicated with the Secretary of State for Home Affairs, who had instructed him to inform the Court that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends."

In view of this answer, given with the authority of the Home Secretary upon a matter which is peculiarly within the cognizance of the Home Office, this Court could not, in my opinion, properly do otherwise than hold that the alleged tort was not committed within the jurisdiction of the High Court.

In the result, therefore, I am of opinion that the appeal succeeds, and that the order for service of notice of the writ on the defendants in Italy must be discharged with costs here and below.

Appeal allowed.

Solicitors for the appellants: *Stokes & Stokes.*

Solicitors for the respondents: *Godfrey Warr, Clarkson & Co., for Batesons & Co., Liverpool.*

Solicitor for the Crown: *The Treasury Solicitor.*

E. C. M. T.

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